Supreme Court, U.S.
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No. __________

IN THE

Supreme Court of the United States

IN RE: MAGIC RESTAURANTS, INC.;
MAGIC AMERICAN CAFÉ, INC.

MAGIC RESTAURANTS, INC.;
MAGIC AMERICAN CAFÉ, INC.,
Petitioners
vs.

BOWIE PRODUCE CO. INC.,
Respondent

PATRICIA A. STAIANO,
Trustee

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Third Circuit's refusal to interpret the Perishable Agricultural Commodities Act ("PACA") as Congress intended subject state institutions to federal regulation in violation of this Court's recent federalism jurisprudence?

2. Did the Third Circuit contravene this Court's precedent regarding proper statutory construction when it refused to defer to the Department of Agriculture's interpretation of PACA in violation of this Court's recent separation of powers jurisprudence?

LIST OF PARTIES

The Petitioner Magic Restaurants, Inc., formerly known as Wetherly Ventures Associates, Inc., was reorganized under a confirmed Chapter 11 plan of reorganization, and is now known as Redheads, Inc. Redheads, Inc. currently operates five restaurants in the New York City area through its wholly-owned subsidiaries under the name "Redheads Bistro/Bar."

Co-debtors in the Chapter 11 bankruptcy proceeding included the following direct or indirect subsidiaries of Magic: Magic Enterprises Inc.; Magic Restaurant of L.I. Corp.; Magic Restaurant at Secaucus, Inc.; Magic Restaurant at Smithhaven, Inc.; Magic Restaurant at Yonkers Corp.; Magic Restaurant at Wayne, Inc.; Magic Restaurant of N.J. Corp.; Magic Carmella's Restaurant Inc.; Magic Restaurant at Sayreville, Inc.; Magic Restaurant at Kew Gardens, Inc.; Magic Restaurants at Kings Plaza, Inc.; Magic American Café Inc.; Carmella's Café of Greece, Inc.; Magic Rock Inc.; Magic Rock Bedford, Inc.; 10 Columbia Corporate Center, Inc.; Magic Restaurant of New York Corp.; Magic Restaurant at Elmsford, Inc.; Magic Restaurant at Staten Island, Inc.

The Respondent Bowie Produce Co., Inc. ("Bowie") was a creditor of Magic. Bowie represented in its disclosure statement to the Third Circuit that it is not a subsidiary of a company and does not own any non-wholly-owned subsidiaries.

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C. *Bowie Produce Co. v. Magic American Café, Inc. (In re Magic Restaurants, Inc.)*, 202 B.R. 24 (D. Del. 1996).

D. *Bowie Produce Co. v. Magic American Café, Inc. (In re Magic Restaurants, Inc.)*, 197 B.R. 455 (Bankr. D. Del. 1996).

E. *Bowie Produce Co. v. Magic American Café, Inc. (In re Magic Restaurants, Inc.)*, 204 B.R. 862 (Bankr. D. Del. 1997).

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H. 61 FED. REG. 13385-86 (Mar. 27, 1996).

I. H.R. Rep. No. 104-207, at 7-11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 454.

J. Letter from Petitioners' Counsel to the United States Department of Agriculture, dated June 16, 1995.

K. Letter from the United States Department of Agriculture to Petitioners' Counsel, dated July 6, 1995.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 205 F.3d 108 (3d Cir. 2000). (App. A). The district court's opinion is unreported. (App. B). The district court's denial of Petitioners' motion for leave to appeal is reported at 202 B.R. 24 (D. Del. 1996). (App. C). The bankruptcy court's interlocutory memorandum opinion and order from which Petitioners sought leave to appeal is reported at 197 B.R. 455 (Bankr. D. Del. 1996). (App. D). The bankruptcy court decision that resulted in a final judgment and order, which contains no issues relevant to this appeal but which ultimately resulted in the district court's final, appealable order, is reported at 204 B.R. 862 (Bankr. D. Del. 1997). (App. E).

JURISDICTION

The court of appeals entered its judgment on March 1, 2000. (App. A). No rehearing was requested. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1993). Arguments presented in this Petition for Writ of Certiorari call into question the constitutionality of an Act of Congress. Thus, 28 U.S.C. § 2403(a) (1994) may apply, and this document will be served on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001. Although the court of appeals did not certify to the Attorney General pursuant to 28 U.S.C. § 2403(a) that the constitutionality of an Act of Congress was drawn into question, Magic solicited the opinion of the United States Department of Agriculture for the agency's interpretation of the statute at issue in this case. (App. J, K).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

The statute involved is 7 U.S.C. § 499a (1999), reproduced in Appendix F.

STATEMENT OF THE CASE

I. Proceedings Below

Petitioners, Magic Restaurants, Inc. and Magic American Café, Inc. (collectively "Magic") are part of an affiliated group that owned and operated a chain of restaurants that filed voluntary Chapter 11 bankruptcy petitions on April 6, 1995. (App. at A-2). The questions presented for review in this case arise from an adversary proceeding instituted in the bankruptcy court by a creditor of Magic, Respondent Bowie Produce Co., Inc. ("Bowie"). (App. at A-2). The bankruptcy court, as the court of first instance, had jurisdiction over the proceeding as a core proceeding under 28 U.S.C. § 157(b)(2)(B), (K) (1993). (App. at D-1).

In the adversary proceeding, Bowie alleged that it was entitled to priority over all creditors because of a statutory constructive trust. Bowie argued that according to the Perishable Agricultural Commodities Act ("PACA"), all proceeds from Bowie's sales of produce to Magic were subject to this trust, and therefore excluded from Magic's bankruptcy estate. (App. at D-2, 3). PACA imposes this constructive trust on assets of certain defined commercial entities in the produce industry–"commission merchants," "brokers," and "dealers." (App. at D-2, 3). Magic filed a motion for summary judgment arguing that PACA's constructive trust remedy did not apply to a restaurant such as Magic, and Bowie therefore was not entitled to any benefits conferred by PACA. Magic's argument also focused on the legislative history and agency interpretation of PACA, both of which indicate that restaurants are not "dealers," "commission merchants," or "brokers." (*See* App. at D-1, 3-4).

The bankruptcy court held that Magic was a "dealer" and denied Magic's motion for summary judgment. (App. at D-3, 7-8). Magic moved for leave to appeal this interlocutory order to the district court, on the sole issue of whether a restaurant is a "dealer" under PACA. The district court denied leave to appeal. (App. at C-1). Bowie then moved for summary judgment, and the bankruptcy court granted it. The bankruptcy court found that Bowie had preserved its right to claim proceeds of the PACA constructive trust and awarded Bowie $93,173.29. (App. at E-1, 4; App. at B-3).

Magic timely perfected an appeal to the district court. The district court reversed the bankruptcy court's order by memorandum opinion and order dated January 6, 1999. (App. at B-1). The district court held that Magic was not a "dealer" under PACA. (App. at B-3, 8-9). Bowie timely perfected its appeal to the United States Court of Appeals for the Third Circuit. (App. at A-2).

Over a dissent by Justice Rendell, a panel of the Third Circuit reversed the district court's judgment and held that the PACA provisions at issue were not ambiguous, that restaurants such as Magic are "dealers" under the statute, and that Bowie was entitled to benefit from the PACA constructive trust.

(App. at A-18). The court of appeals determined that it could not consider the legislative history or the Department of Agriculture's interpretations of PACA, which explicitly state that restaurants are not considered dealers under PACA. (App. at A-15). The court admitted that its interpretation of PACA contravened seventy years of practice of the United States Department of Agriculture. (App. at A-17).

In her dissent, Justice Rendell argued that the plain language of the statute was ambiguous. (App. at A-19). She observed that PACA "confines the concept of 'dealer' to those who [buy or sell in wholesale or jobbing quantities] as their bread and butter" and that because of the majority's incorrect statutory construction, the decision "would make most prisons 'dealers,' yet prisons are not engaged in the perishable commodity-buying business." (App. at A-19, 20). She further observed that the legislative history–a House report that describes the term "retailer," upon which "dealer" status in part relies–"made clear that food service establishments such as restaurants or schools, hospitals, and other institutional cafeterias are not required to be licensed." (App. at A-19).

II. Relevant Background Facts

Before Magic filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code, Magic, directly or through its subsidiaries, owned and operated fifteen restaurants in the Washington, D.C. and New York City metropolitan areas. (App. at A-2). The Washington D.C. restaurants included the American Café restaurants.

As part of its ordinary business operations, Magic purchased fresh fruit and vegetables from Bowie. Magic would then process the produce into menu items, such as salads and hamburger trimmings, for sale to its customers. (App. at A-2).

During all relevant periods, Magic's various restaurants bought their perishable agricultural products from local suppliers. The parties stipulated that Magic did not act as a central distributer for its individual subsidiary restaurants.

Magic and several of its affiliates filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware on April 6, 1995. (App. at A-2). On December 30, 1996, the bankruptcy court entered an order confirming Magic's Second Amended Chapter 11 Plan of Reorganization (the "Plan"). (App. at B-2, 3). The Plan expressly permitted the appeal of the bankruptcy court's order regarding dealer status under PACA to continue to final disposition.

REASONS FOR GRANTING THE PETITION

I. The Court Of Appeals' Incorrect Statutory Construction Implicates Important Questions Of Federalism And Separation Of Powers That Should Be Decided By This Court.

This Court has acknowledged the primordial importance of the separation of powers and federalism principles embedded in the Constitution. *E.g., Printz v. United States*, 521 U.S. 898, 920 (1997) (noting Framers' explicit choice of a Constitution that regulates individuals, not States); *Buckley v. Valeo*, 424 U.S. 1, 119-20 (1976) (stating that the "doctrine of separation of powers . . . is at the heart of our Constitution"). These principles are front and center in this case because the court of appeals' incorrect statutory construction drastically expanded PACA's scope beyond Congress's intent.

Congress enacted PACA seventy years ago to protect small farmers and shippers from abuses in the agricultural commodities industry. *See Chidsey v. Geurin*, 443 F.2d 584, 587-88 (6th Cir. 1971) (citing legislative history for purposes behind PACA's reparation order procedure as providing "a reasonably fair and reliable means of settling disputes between farmers and brokers"); *Zwick v. Freeman*, 373 F.2d 110, 116 (2d Cir. 1967) (noting purpose of PACA and citing legislative history), *superseded by statute as stated in Norinsberg v. United States Dep't of Agriculture*, 162 F.3d 1194, 1199 (D.C. Cir. 1998) (finding a PACA provision ambiguous). The specifically enumerated entities within PACA's purview–"commission merchants," "brokers," and "dealers"–have remained essentially unchanged through thirty-four Congressional sessions. *See* 7 U.S.C. § 499a(b)(5)-(7) (1999). (App. at F-2).

Although Congress has made other amendments to PACA, it has seen no reason to alter the very limited scope of a regulatory scheme that everyone–including the Department of Agriculture–thought they understood. (App. at K-2 (Department of Agriculture correspondence informing Magic that restaurants do not fall within PACA); *see also* App. at A-18 (noting Department of Agriculture's "refusa[l] to exercise jurisdiction over restaurants for approximately seven decades")). The Third Circuit's activist interpretation of PACA changes this understanding because it ignores the relevant legislative history and fails to defer to longstanding Department of Agriculture practice. Two unsettling consequences result.

First, the court of appeals' interpretation that restaurants are "dealers" under PACA merely because of the quantity of produce they purchase will necessarily lead to other decisions holding that any public institution that buys a certain amount of produce is subject to PACA's stringent regulatory scheme.

Virtually all prisons and school districts in this country regularly purchase more produce than did Magic. This interpretation of PACA is unconstitutional under the Tenth Amendment because it improperly permits federal regulators to intrude on the States' rights to regulate public institutions such as prisons, schools, and other state agencies that operate a food service. By reading the PACA definitions out of context, the court of appeals' judgment and opinion made all of PACA's stringent licensing, inspection, and other procedures applicable to state agencies and institutions. *E.g.*, 7 U.S.C. § 499c (1999) (App. at F-9 (licensing)); *id.* § 499n (App. at F-38 (inspections)).

This Court has recognized the States' authority to manage important institutions, such as prisons, as they deem fit. *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973) (noting States' strong interest in managing prison systems). Indeed, Justice Rendell in her dissent noted this improper result, which implicates the accountability problem that Justice O'Connor described in the Court's decision in *New York v. United States*, 505 U.S. 144, 163 (1992), and which Justice Scalia reiterated for the Court in *Printz*, 521 U.S. at 920. Accountability, or "representational reinforcement,"[1] requires that significant public policy decisions be made in full view of the electorate. *New York*, 505 U.S. at 169; *see also Printz*, 521 U.S. at 920 (stating that the Constitution "contemplates that a State's government will represent and remain accountable to its own citizens"). Because the court of appeals, as part of the federal judiciary, has no constituency, it is not accountable for this dramatic change in public policy.

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[1] *See generally* Deborah Jones Merritt, *The Guarantee Clause And State Autonomy: Federalism For A Third Century*, 88 COLUM. L. REV. 1, 61-62 (1988) (describing adverse effects of federal government's appropriating state resources); D. Bruce La Pierre, *Political Accountability In The National Political Process–The Alternative To Judicial Review Of Federalism Issues*, 80 NW. U. L. REV. 577, 639-65 (1985) (describing concept of accountability in federalism issues).

Second, the court of appeals' opinion further erodes the priority structure under the United States Bankruptcy Code, by applying the PACA constructive trust remedy to a whole new class of debtors. This result has ramifications for the entire restaurant industry and the commercial lenders who heretofore thought that their collateral in a restaurant's inventory and receivables was secure. Because this errant decision has occurred in the Third Circuit, this Court's guidance on the scope of PACA is especially warranted. The Third Circuit includes the state of Delaware, which is home to a tremendous number of bankruptcy proceedings. Because the Third Circuit's decision is the first appellate decision on this issue, it stands ready to do considerable harm in every pending and future bankruptcy case that includes a restaurant.

This Court has addressed PACA only once since its enactment in 1930. *See Hartford Accident & Indem. Co. v. Illinois ex rel. McLaughlin*, 298 U.S. 155 (1936). This decision did not consider the issue in this case. Indeed, the court of appeals recognized that it was the first United States Court of Appeals to address the issue. (App. at A-11, 12). Despite decades of silence on the scope of PACA, the lower federal courts have suddenly seen considerable debate and disagreement on whether a restaurant is a "dealer." This debate has been spurred by the activist PACA bar, which decided around 1995, about a decade after PACA's constructive trust was adopted, to attempt to change United States agricultural policy through adjudication, rather than through the proper administrative channels. This activism has now resulted in a drastic change in agricultural policy for this country. In fact, the Ninth Circuit and the Tenth Circuit will soon be addressing this identical issue because at least three other lower court decisions are currently on appeal.[2]

Until the series of decisions leading up to the Third Circuit's decision in this case, every decision holding that restaurants are dealers under PACA had occurred in the Ninth Circuit. *Sysco Food Servs. of Seattle, Inc. v. Country Harvest Buffet Restaurants, Inc. (In re Country Harvest Buffet Restaurants, Inc.),* 245 B.R. 650, 656 (B.A.P. 9th Cir. 2000); *Royal Foods Co. v. L.R. Holdings, Inc.*, No. C 99-01609 WHA, 1999 WL 1051978, at *5 (N.D. Cal. Nov. 10, 1999) (not reported); *JC Produce, Inc. v. Paragon Steakhouse Restaurants, Inc.*, 70 F. Supp. 2d 1119, 1122 (E.D. Cal. 1999). These cases have held that a restaurant is a "dealer" by (i) ignoring that the term "restaurant" appears nowhere in the plain language of the statute, and (ii) turning a blind eye to the legislative history and agency interpretation that demonstrate PACA was not intended to apply to restaurants. *Country Harvest Buffet,* 245 B.R. at 653-56; *Royal Foods*, 1999 WL 1051978, at *2-5; *JC Produce,* 70 F. Supp. 2d at 1121-22. *Royal Foods* and *JC Produce* are two of the cases currently on appeal to the Ninth Circuit.

At the other end of the statutory construction spectrum are the courts (including the Delaware district court) that note Congress's silence on the specific issue and incorporate both the Department of Agriculture's interpretation and the relevant legislative history into the interpretive mix. *E.g., Demma Fruit Co. v. Old Fashioned Enters., Inc. (In re Old Fashioned Enters., Inc.)*, 245 B.R. 639, 644 (D. Neb. 2000); *Monteverde's Inc. v. Italian Oven, Inc. (In re Italian Oven, Inc.)*, 207 B.R. 839, 841-45 (Bankr. W.D. Pa. 1997). These cases further held that PACA does not apply to restaurants because (i) the statute lacks any reference to restaurants, (ii) the Department of Agriculture has not regulated restaurants under PACA, and (iii) the relevant legislative history denotes no application of PACA to restaurants.

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[2] *E.g., Demma Fruit Co. v. Old Fashioned Enters., Inc. (In re Old Fashioned Enters., Inc.),* 245 B.R. 639, 643-44 (D. Neb. 2000) (notice of appeal to the 10th Circuit entered on docket March 3, 2000); *Royal Foods Co. v. L.R. Holdings, Inc.*, No. C 99-01609 WHA, 1999 WL 1051978 (N.D. Cal. Nov. 10, 1999) (not reported) (notice of appeal to the 9th Circuit entered on docket December 28, 1999) (not reported); *JC Produce, Inc. v. Paragon Steakhouse Restaurants, Inc.*, 70 F. Supp. 2d 1119, 1121-22 (E.D. Cal. 1999) (notice of appeal to the 9th Circuit entered on docket November 2, 1999).

If the Ninth or Tenth Circuit rejects the Third Circuit's reasoning in this case, then a true split in the circuits will exist. This result would further justify the grant of the petition for certiorari in this case. If, however, the Ninth or Tenth Circuit adopts the erroneous reasoning of the Third Circuit, the litigants in those cases may file petitions for writ of certiorari that may be considered with this petition. Thus, Petitioners also are requesting, in the alternative to granting this petition outright, that the Court hold a decision on this petition pending the Ninth Circuit's or Tenth Circuit's review of this same issue.

However, the limited authority on this specific issue, the confusion in bankruptcy and district courts regarding the proper interpretation of this arcane statute, and the significant implications on separation of powers and federalism in holding restaurants and other institutions accountable under PACA merely as a result of the quantity of produce they purchase, combine to make this question a compelling one that this Court should answer by granting this petition.

II. The Court Of Appeals' Judgment And Opinion Conflict With This Court's Federalism And Separation Of Powers Jurisprudence.

When the court of appeals failed to adhere to this Court's rules for proper statutory construction, it ran afoul of two interrelated constitutional principles.[3] First, by expanding PACA's reach to restaurants, and, necessarily, to prisons and schools, the court of appeals has interpreted PACA in an unconstitutional manner, infringing on the States' sovereign rights as part of " 'an indestructible Union, composed of indestructible States.' " *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (quoting *Texas v. White*, 74 U.S. 700, 725 (1868)). This Court has recognized that the regulation of a state prison system constitutes a traditional State function. *See, e.g., Procunier v. Martinez*, 416 U.S. 396, 412 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989); *Preiser*, 411 U.S. at 491 ("It is difficult to imagine an activity in which a State has a stronger interest"). Thus, any intent by Congress to "alter the 'usual constitutional balance between the States and the Federal Government' " must be "unmistakably clear." *Gregory*, 501 U.S. at 460-61. PACA includes no such clear expression.

Similarly, in refusing to defer to an agency interpretation of PACA, the court of appeals disregarded basic tenets of separation of powers jurisprudence. The rules for agency deference recognize that "[j]udges are not experts in the field, and are not part of either political branch of the government."

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[3] **"Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).**

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984). When the judiciary interprets a statute contrary to an agency's interpretation, the public has no outlet for voicing disagreement with the policy choice the court has made. *See id.* As this Court noted in *Chevron*, "[w]hile agencies are not directly accountable to the people, the Chief Executive is." *Id.* Thus, "federal judges–who have no constituency–have a duty to respect legitimate policy choices by those who do." *Chevron U.S.A.*, 467 U.S. at 866. The Constitution vests such lawmaking responsibilities in the political branches, not the judiciary. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978). The court of appeals' judgment and opinion invaded the lawmaking function of another branch of Government and therefore violate separation of powers principles.

A. A Common-Sense, Contextual Reading Of PACA Is Not Only Possible But Is Required.

A court must place a statute in context. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1301 (2000) (noting that a court must read a statute in context, fitting its parts into a coherent whole). Because PACA's purposes were narrowly drawn, the court of appeals was bound to interpret PACA narrowly. It is especially important that the constructive trust remedy be narrowly interpreted and applied because it overturns the priority structure of the Bankruptcy Code. *Cf. Nathanson v. National Labor Relations Bd.*, 344 U.S. 25, 29 (1952) (stating that the theme of the Bankruptcy Act is "equality of distribution" and any preference for one claimant over another must be clear from the statute).

Although Congress recognized the effect on secured creditors when it enacted PACA's constructive trust remedy in

1984, it has never altered the statute's definition of the types of entities in the produce industry within PACA's regulatory scheme. *See Bank of Los Angeles v. Official PACA Creditors' Comm. (In re Southland + Keystone)*, 132 B.R. 632, 640 (B.A.P. 9th Cir. 1991) (noting Congress's recognition of impact of PACA's constructive trust on secured lenders); *see also* 7 U.S.C. § 499e(c)(2) (1999). (App. at F-19; *see also* App. at A-4 (noting 1984 and other amendments to PACA)). The statute thus remains as it did at its inception: it does not specifically address restaurants, and rightly so. A restaurant is an ultimate consumer of perishable commodities–not a middleman. To include restaurants as "dealers" requires stretching the language of the statute beyond its breaking point. Such an interpretation warps the true meaning and purpose of PACA.

The statute defines a dealer as one who "engage[s] in the business of buying or selling in wholesale or jobbing quantities." 7 U.S.C. § 499a(b)(6) (1999). (App. at F-2). The court of appeals read this language to mean that any entity that bought a wholesale or jobbing quantity of a perishable agricultural commodity, irrespective of whether it really acted as a dealer, would be subsumed into PACA's stringent regulatory scheme and subject to the jurisdiction of the Department of Agriculture. (App. at A-14).

To be "engaged in a business" denotes one's occupation. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 412 (1989) (defining "engaged" as "involved in" or "occupied"); *see also id.* at 190 (defining "business" as "a particular field of endeavor" or "mercantile activity engaged in as a means of livelihood," or "trade"). Magic's purchase of perishable agricultural commodities was no more its "occupation" or "livelihood" than its purchase of dishes and silverware. Yet it would be preposterous to argue that a restaurant such as Magic was a dealer of dishes or silverware. A restaurant simply is not "engaged in the business" of buying and selling wholesale quantities of food. This buying and selling is merely incidental to the business in which it is engaged. The court of appeals' rejection of a common-sense meaning of these statutory terms contravenes the most basic canons of statutory construction. *See, e.g., Food & Drug Admin.*, 120 S. Ct. at 1301.

B. The Court Of Appeals Failed To Apply *Chevron*-Style Deference And Ignored That The Department Of Agriculture Has Never Applied PACA To Restaurants.

Because of the risks inherent in a court's interpreting laws in an esoteric subject matter, this Court requires that the task of translating Congress's mandates into practical rules be left to those learned in the field. *Chevron U.S.A.*, 467 U.S. at 843-44; *see also Mead Corp. v. Tilley*, 490 U.S. 714, 722 (1989). The term "*Chevron*-style" deference reflects this recognition, and this deference has therefore become a necessary part of statutory analysis when a case "involves an administrative agency's construction of a statute which it administers." *Food & Drug Admin.*, 120 S. Ct. at 1300; *see also* Cass R. Sunnstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2109-15 (1990); Antonin R. Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516-17; Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 303-08 (1988). This Court has observed that "a court that tries to chart a true course to [a statute's] purpose embarks upon a voyage without a compass when it disregards the agency's views." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980). The court of appeals veered far off course when it deemed irrelevant the Department of Agriculture's perspective on what it perceived as an unambiguous expression of Congress's intent. (App. at A-13).

The Department's regulations include various definitions for "dealer," all of which support the conclusion that PACA cannot affect restaurants as the end-users of produce. *See* 7 C.F.R. § 46.2(m) (2000). (App. at G-1). The only definition remotely referable to a restaurant is "retailer." A retailer is considered a "dealer" only when "the invoice cost of all purchases of produce exceeds $230,000 during a calendar year." 7 C.F.R. § 46.2(m)(2). (App. at G-1). But the definition of retailer only reinforces that the statute's aim is at the middleman level of buying and selling agricultural commodities: A "retailer" is defined as "a dealer engaged in the business of selling any perishable agricultural commodity." 7 C.F.R. § 46.2(j). (App. at G-1). A "retailer" is generally defined as an entity selling small quantities of a product to a consumer of that same product. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1213 (1989) (defining "retail" as "to sell in small quantities directly ***to the ultimate consumer***") (emphasis added). Because a retailer is defined as selling small quantities, the definition simply makes plain that whenever the retailer sells small quantities rather than wholesale or jobbing quantities, dealer status exists and PACA applies. A grocery store is a perfect example.

In the retailer/consumer paradigm that the Department's regulations suggest, Bowie was the retailer and Magic was the consumer. Magic did not sell tomatoes or heads of lettuce to its customers, like a grocery store. Rather, it sold menu items such as hamburgers that happened to include pieces of lettuce and tomato as trimmings. A restaurant is simply too far down the line in the produce "food chain" to implicate any of PACA's purposes in protecting small farmers. Legislative history regarding the 1995 amendments to PACA confirms this fact.

H.R. Rep. No. 104-207 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453. (App. at I-2, 3).

The true measure of the Department of Agriculture's interpretation, however, is its unequivocal statements that restaurants are not subject to PACA. It has stated this position both in the official notice and comment period that accompanied the 1995 amendments to PACA, and in correspondence with Magic on this specific issue. (*See* App. at H-4 (noting existence of notice and comment period); App. at J-1, K-2).

In the first instance, the Secretary of Agriculture publicly stated its position in the FEDERAL REGISTER as follows:

> Restaurants ***traditionally have not been considered subject to the PACA by USDA or Congress unless the buying arm of the restaurant is a separate legal entity***, and is buying for and/or selling the product to another entity. ***Since restaurants are not subject to the PACA***, this change in the regulation will not impact restaurants.

61 FED. REG. 13385, 13386 (Mar. 27, 1996) (emphasis added). (App. at H-5, 6). The parties stipulated that Magic did not operate as such for its affiliate restaurants.

This perspective was echoed in Magic's correspondence with the Department of Agriculture. (*See* App. J). Magic outlined for the Department of Agriculture its operations for a specific determination of whether Magic constituted the type of entity subject to PACA. (App. at J-1, 2). The Department of Agriculture unequivocally replied that restaurants are not subject to PACA because they are not "commission merchants," "dealers," or "brokers." (App. at K-2).[4]

The Department of Agriculture's specific response to Magic, as well as the Department's practice of not regulating restaurants, represent a reasonable interpretation of PACA that deserved recognition as persuasive authority on the letter and spirit of PACA. *See Ford Motor Credit Co.*, 444 U.S. at 568 (noting rule that courts must refrain from substituting their own interstitial lawmaking for that of the agency, so long as the latter's lawmaking is not irrational). The court of appeals' failure to yield to a reasonable agency interpretation resulted in an impermissible invasion of the legislative branch of Government, in violation of separation of powers principles.

When a court expands the breadth of Congress's intent–or unexpressed intent–as the court of appeals' judgment and opinion do, the public is left with no vehicle for expressing its discontent with the result. The court of appeals' activist interpretation and resulting judgment have left the public hamstrung, and subjected the public to watching helplessly as its tax dollars for funding schools and prisons are held hostage to PACA's constructive trust, and public institutions are now subject to a sweeping new regulatory scheme.

Justice Rendell warned in her dissent of the dire repercussions of the court of appeals' judgment, but only this Court can ensure those repercussions do not come to pass.

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[4] It must be noted here that the Department later corresponded with Magic, stating tersely that unidentified entities in the produce industry had informed it that Magic was required to be licensed. On its face, however, the "form letter" correspondence is nonresponsive. It fails to negate the detailed response that Magic received just weeks earlier based on facts specific to Magic.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should hold this petition, pending disposition of appeals now pending before the United States Court of Appeals for the Ninth and Tenth Circuits involving the identical issues presented in this petition.

Respectfully submitted,

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Dated: May 30, 2000

APPENDIX

APPENDIX

A. *Magic Restaurants, Inc. v. Bowie Produce Co. (In re Magic Restaurants, Inc.),* 205 F.3d 108 (3d Cir. 2000).

B. *Magic American Cafe, Inc. v. Bowie Produce Co. (In re Magic Restaurants, Inc.),* Case Nos. 95-376 through 95-392 (HSB), C.A. No. 97-300-JJF (D. Del. Jan. 6, 1999).

C. *Bowie Produce Co. v. Magic American Cafe, Inc. (In re Magic Restaurants, Inc.),* 202 B.R. 24 (D. Del. 1996).

D. *Bowie Produce Co. v. Magic American Cafe, Inc. (In re Magic Restaurants, Inc.),* 197 B.R. 455 (Bankr. D. Del. 1996).

E. *Bowie Produce Co. v. Magic American Cafe, Inc. (In re Magic Restaurants, Inc.),* 204 B.R. 862 (Bankr. D. Del. 1997).

F. The Perishable and Agricultural Commodities Act, 7 U.S.C. § 499a (1999).

G. Definition of "Retailer," 7 C.F.R. § 46.2 (j), (m)(2000).

H. 61 FED. REG. 13385-86 (Mar. 27, 1996).

I. H.R. Rep. No. 104-207, at 7-11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 454.

J. Letter from Petitioners' Counsel to the United States Department of Agriculture, dated June 16, 1995.

K. Letter from the United States Department of Agriculture to Petitioners' Counsel, dated July 6, 1995.

APPENDIX A

In re MAGIC RESTAURANTS, INC.; Magic American
Cafe, Inc., Debtors

Magic Restaurants, Inc.; Magic American Cafe, Inc.

v.

Bowie Produce Co., Inc., Appellant
Patricia A. Staiano, Trustee.
No. 99-5113.

United States Court of Appeals,
Third Circuit.

Argued: Dec. 8, 1999

Filed: March 1, 2000

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

ROSENN, Circuit Judge.

The sole question presented by this appeal is whether restaurants are "dealers" under the Perishable Agricultural Commodities Act, 7 U.S.C. § 499a *et seq.* ("PACA"), and therefore subject to its trust provision, 7 U.S.C. § 499e(c). The United States Bankruptcy Court for the District of Delaware held that they are, and subsequently granted partial summary judgment in favor of the Appellant. The United States District Court reversed. We hold that restaurants are dealers under the plain language of PACA, and we therefore reverse the order of the district court and reinstate the order of the bankruptcy court.

I.

On April 6, 1995, Magic Restaurants, Inc. and Magic American Cafe, Inc. (collectively "Magic") filed voluntary bankruptcy petitions in the bankruptcy court for reorganization under Chapter 11 of the Bankruptcy Code. Magic, directly or through its subsidiaries, owned and operated fifteen restaurants in the Washington, D.C. and New York City metropolitan areas. These restaurants generated $20 million in sales revenues in a six month period in 1995-96. Magic purchased fresh fruits and vegetables from Bowie Produce Co., Inc. ("Bowie"), which it processed into food items, including salads or hamburger trimmings, and sold to its restaurant customers. At the time Magic filed for bankruptcy in April 1995, it owed Bowie $98,983.74 for these produce purchases.

Bowie commenced an adversarial proceeding in the bankruptcy court to recover full payment from Magic on the ground that the proceeds from the produce Magic had purchased were trust funds under Section 5(c) of PACA, 7 U.S.C. § 499e(c). Magic moved for summary judgment on the ground that as a restaurant, it was not a "dealer," and was therefore not subject to PACA's trust provision. By memorandum opinion and order dated June 18, 1996, the bankruptcy court denied Magic's motion and held that Magic was a "dealer" under the plain language of PACA. On January 15, 1997, the bankruptcy court granted partial summary judgment for Bowie, awarding it $93,173.29 in trust proceeds.

Magic appealed the bankruptcy court's ruling to the district court pursuant to 28 U.S.C. § 158(a). The district court reversed the bankruptcy court by memorandum opinion and order dated January 6, 1999, holding that Magic was not a "dealer" under PACA and therefore was not subject to its trust provision. This timely appeal followed.

II.

A. Statutory Background.

Congress enacted PACA in 1930 "to promote fair trading practices in the marketing of perishable agricultural commodities, largely fruits and vegetables." *Consumers Produce Co., Inc. v. Volante Wholesale Produce, Inc.*, 16 F.3d 1374, 1377-78 (3d Cir.1994). PACA was " 'designed primarily for the protection of the producers of perishable agricultural products--most of whom must entrust their products to a buyer or commission merchant who may be thousands of miles away, and depend for their payment upon his business acumen and fair dealing.' " *In re Kornblum & Co., Inc.*, 81 F.3d 280, 283 (2d Cir.1996) (quoting H.R.Rep. No. 1196, at 2 (1955), reprinted in 1956 U.S.C.C.A.N. 3699, 3701). Producers of perishable agricultural goods are in large part dependent upon the honesty and scrupulousness of the purchaser or consignee who geographically may be far removed. To provide producers with some protection, Congress fortified the original PACA with two primary weapons. First, it prohibited certain conduct by "commission merchants," "brokers," or "dealers." 7 U.S.C. § 499b. Failure to abide by these prohibitions rendered the "commission merchant, dealer, or broker ... liable to the person or persons injured thereby for the full amount of damages ... sustained in consequence of such violation." *Id.* §§ 499e(a) & 499e(b). Second, PACA established a mandatory licensing scheme, under the supervision of the Secretary of Agriculture, for any "person" carrying on "the business of a commission merchant, dealer, or broker." *Id.* § 499c. The Secretary was given the power to refuse, suspend, or terminate licenses on numerous grounds, including conduct prohibited under § 499b. *See* 7 U.S.C. §§ 499c, 499d, 499h. Any person doing business without the required license was subject to monetary penalties. *Id.* § 499c(a).

PACA in its original form therefore protected produce growers and producers, and worked to make "the marketing of perishable agricultural commodities more orderly and efficient." *Hull Co. v. Hauser's Foods, Inc.*, 924 F.2d 777, 779 (8th Cir.1991). Even with the passage of a half-century after its initial enactment, Congress, in 1984, determined that prevalent financing practices in the perishable agricultural commodities industry were placing the industry as a whole, including produce sellers, in jeopardy. It responded by amending PACA, explaining:

> It is hereby found that a burden on commerce in perishable agricultural commodities is caused by financing arrangements under which commission merchants, dealers, or brokers, who have not made payment for perishable agricultural commodities purchased, contracted to be purchased, or otherwise handled by them on behalf of another person, encumber or give lenders a security interest in, such commodities, or on inventories of food or other products derived from such commodities, and any receivables or proceeds from the sale of such commodities or products, and that such arrangements are contrary to the public interest....

7 U.S.C. § 499e(c)(1).[1]

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[1] The legislative history of the 1984 PACA amendments further explains the problem Congress intended to address:

> Sellers of agricultural commodities are often located thousands of miles from their customers. Sales transactions must be made quickly or they are not made at all.... Under such conditions, it is often difficult to make credit checks, conditional sales agreements, and take other traditional safeguards.

(continued...)

In order to "remedy such burden on commerce in perishable agricultural commodities and to protect the public interest," *id.*, Congress "increase[d] the legal protection for unpaid *sellers* and *suppliers* of perishable agricultural commodities until full payment of sums due have been received by them," H.R.Rep. No. 98-543, at 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 406 (emphasis added), by enacting 7 U.S.C. § 499e(c). This provision imposes a floating, non-segregated trust on produce buyers for the benefit of unpaid produce suppliers.[2] The corpus of this trust is comprised of (1) the

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[1] (...continued)

* * * * * *

> Many [buyers], in the ordinary course of their business transactions, operate on bank loans secured by [their] inventories, proceeds or assigned receivables from sales of perishable agricultural commodities, giving the lender a secured position in the case of insolvency. Under present law, sellers of fresh fruits and vegetables are unsecured creditors and receive little protection in any suit for recovery of damages where a buyer has failed to make payment as required by the contract.
>
> In recent years, produce sellers have been subjected to increased instances of buyers failure to pay and slow payments.

H.R.Rep. No. 98-543, at 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 406.

[2] The trust provision states, in relevant part:

> Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full

(continued...)

perishable agricultural commodities purchased from these suppliers, (2) all inventories of food or other products derived from the perishable agricultural commodities, and (3) receivables or proceeds from the sale of such commodities or products. 7 U.S.C. § 499e(c)(2). The statutory trustee is the delinquent "commission merchant, dealer, or broker." *Id.* The unpaid supplier loses the benefits of the trust unless written notice of intent to preserve the trust is given to the trustee within thirty calendar days after payment must be made. *Id.* § 499e(c)(3). In essence, PACA's trust provision gives the unpaid supplier an interest in the trust corpus superior to the interest of any other lien or secured creditor. *See Consumers Produce,* 16 F.3d at 1379; *In re W.L. Bradley Co., Inc.,* 75 B.R. 505, 509 (Bankr. E.D. Pa. 1987) (*quoting In re Prange Foods, Corp.,* 63 B.R. 211, 214 (Bankr. W.D. Mich. 1986)).

B. The District Court's Decision.

Bowie's appeal hinges on its contention that Magic is a "dealer" under PACA.[3] If Bowie is correct, it has priority to certain of Magic's assets as the beneficiary of PACA's statutorily imposed trust. PACA defines the term "dealer" as "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign

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[2] (...continued)

> payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents....

7 U.S.C. § 499e(c)(2).

[3] Bowie did not contend in the bankruptcy court or the district court and does not contend now that Magic is a "commission merchant" or a "broker."

commerce...." 7 U.S.C. § 499a(b)(6). PACA also provides three exceptions to this definition:

> (A) no producer shall be considered as a "dealer" in respect to sales of any such commodity of his own raising;
>
> (B) no person buying any such commodity solely for sale at retail shall be considered as a "dealer" until the invoice cost of his purchases of perishable agricultural commodities in any calendar year are in excess of $230,000; and
>
> (C) no person buying any commodity other than potatoes for canning and/or processing within the State where grown shall be considered a "dealer" whether or not the canned or processed product is to be shipped in interstate or foreign commerce, unless such product is frozen or packed in ice, or consists of cherries in brine....

Id. Finally, this provision notes that "[a]ny person not considered as a 'dealer' under clauses (A), (B), and (C) may elect to secure a license under the provisions of section 499c of this title, and in such case and while the license is in effect such person shall be considered as a 'dealer'." Magic has never secured such a license, and contends that no restaurant has done so.

The parties do not dispute that Magic purchases "wholesale or jobbing quantities" of perishable agricultural commodities in interstate commerce.[4] Bowie therefore contends that, based on the plain language of the statute, Magic is a "dealer" and is subject to the trust. The bankruptcy court agreed, but the district court reversed. The court held that PACA "is silent on the issue of whether restaurants qualify as 'dealers,' " and therefore, "Congress has not spoken directly to the issue of PACA's applicability to restaurants." Thus, the district court proceeded to consider regulations promulgated by the USDA under its authority to administer PACA. *See* 7 U.S.C. § 499o.

These USDA regulations define "dealer" as:

> any person engaged in the business of buying or selling in wholesale or jobbing quantities in commerce and includes:
>
> (1) Jobbers, distributors and other wholesalers;
>
> (2) Retailers, when the invoice cost of all purchases of produce exceeds $230,000 during a calendar year. In computing dollar volume, all purchases of fresh and frozen fruits and vegetables are to be counted, without regard to quantity involved in a transaction or whether the transaction was intrastate, interstate or foreign commerce;
>
> (3) Growers who market produce grown by others.

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[4] Regulations promulgated by the United States Department of Agriculture ("USDA") define "wholesale or jobbing quantities" as "aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received." 7 C.F.R. § 46.2(x).

7 C.F.R. § 46.2(m). The district court concluded that under this regulation, in order to be a "dealer" an entity had to fall into one of the categories enumerated in 7 C.F.R. § 46.2(m)(1), (2), or (3). The court determined that the only possible category a restaurant such as Magic could fall into was that of "retailers" under 7 C.F.R. § 46.2(m)(2), but concluded that restaurants such as Magic were consumers, not retailers. Accordingly, the district court held that under this USDA regulation, Magic was not a dealer.

The court found support for this conclusion in two additional sources. First, in 1996, USDA amended its regulatory definition of "fresh fruits and vegetables," 7 C.F.R. § 46.2(u), to include oil-blanched frozen fruits and vegetables, thereby bringing such produce within PACA's reach. In its statement accompanying publication of the final rule, USDA described a comment it received from a representative of a major restaurant chain voicing its concern that the rule change "might bring restaurants under the jurisdiction of the PACA." Final Rule, "Regulations (Other Than Rules of Practice) Under the Perishable Agricultural Commodities Act, 1930 (PACA)," 61 Fed. Reg. 13385, 13386 (Mar. 27, 1996). USDA responded:

> Restaurants traditionally have not been considered subject to the PACA by USDA or Congress unless the buying arm of the restaurant is a separate legal entity, and is buying for and/or reselling the product to another entity. Since restaurants are not subject to the PACA, this change in the regulation will not impact restaurants.

Id.

Second, in 1995, Congress amended PACA. These amendments had no bearing on who was and was not covered by the statute.[5] In the report of the House Committee on Agriculture accompanying the 1995 PACA Amendments Act, the Committee explained that:

> Section 3 phases out license fees for retailers and grocery wholesalers. It defines the term "retailer" as a person who is a dealer engaged in the business of selling any perishable commodity at retail. Approximately 4,000 retailers are currently estimated to be licensed under PACA. Those businesses such as grocery stores and other like businesses that predominantly serve those consumers purchasing food for consumption at home or off the premises of the retail establishment are considered to be included in the definition of retailer. It is not the intent of the Committee that the definition of retailer be construed to include foodservice establishments such as restaurants, or schools, hospitals and other institutional cafeterias.

H.R.Rep. No. 104-207, at 7 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 454.

Accordingly, based on this regulatory interpretation and legislative history, the district court held that restaurants such as Magic are not "dealers" and are therefore not subject to PACA's trust provision.

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[5] Essentially, the 1995 amendments phased retailers and grocery wholesalers out of license fee payment, allowed USDA to adjust license fees under its rulemaking authority, "require[d] USDA to receive a written complaint before pursuing an investigation, require[d] additional USDA investigation notification procedures, increase[d] ... administrative penalties, establishe[d] civil penalties, clarifie[d] the status of collateral fees and expenses, and clarifie[d] misbranding prohibitions...." H.R.Rep. No. 104-207, at 6 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 453. Other than these changes, the House Committee on Agriculture explained, the law remained unaffected. *Id.*

III.

The question of whether a restaurant with extensive operations such as Magic is a "dealer" under PACA is a purely legal determination. Accordingly, this court exercises plenary review over the judgment of the district court. *In re Reading Co.,* 115 F.3d 1111, 1124 (3d Cir.1997).

A. The Statutory Language.

In resolving this issue, the first question we must ask is whether the plain language of the statute is unambiguous. *Idahoan Fresh v. Advantage Produce, Inc.,* 157 F.3d 197, 202 (3d Cir.1998). If it is, there is generally no need to look to administrative interpretations or to legislative history. *Ratzlaf v. United States,* 510 U.S. 135, 147-48, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994); *Idahoan Fresh,* 157 F.3d at 202; *West v. Sullivan,* 973 F.2d 179, 185 (3d Cir.1992), *cert. denied,* 508 U.S. 962, 113 S.Ct. 2934, 124 L.Ed.2d 684 (1993). If the statute is "silent or ambiguous as to the specific issue," and an administrative agency charged with administering the statute has devised its own regulatory interpretation of the statute, the court must then ask "whether the agency's answer is based on a permissible construction of the statute." *West,* 973 F.2d 179 at 185 (quoting *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.,* 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

In the more than half-century since the initial enactment of PACA, only three other courts have addressed whether restaurants are "dealers" under it. We appear to be the only United States Court of Appeals to consider the question.

Recently, two district courts in California concluded, like the bankruptcy court in this case, that restaurants are "dealers" under the plain language of PACA. *See Royal Foods Co. v. L.R. Holdings, Inc.*, No. C 99-01609, 1999 WL 1051978 (N.D. Cal. Nov.10, 1999); *JC Produce, Inc. v. Paragon Steakhouse Restaurants, Inc.*, 70 F.Supp.2d 1119 (E.D. Cal.1999). However, in *In re Italian Oven, Inc.*, 207 B.R. 839 (Bankr. W.D. Pa. 1997), the bankruptcy court, like the district court in this case, held that PACA's definition of "dealer" is ambiguous, that the USDA regulation defining "dealer" did so to the exclusion of anyone not expressly described by the regulation, and that the restaurant debtor in that case was not a retailer under this regulation and therefore not subject to PACA's trust provision. The *Italian Oven* court considered and expressly rejected the reasoning of the bankruptcy court in this case. *Id.* at 842-43.[6]

As noted above, USDA, the agency charged with administering PACA, has indicated its view that restaurants are not "dealers" under that statute. Indeed, that agency's consistent practice for seven decades since PACA's enactment has been to deny that the statute gives it jurisdiction over restaurants.[7] Nevertheless, "a reviewing court should not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms." *Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 476, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992).

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[6] It gave three reasons in support of its holding that PACA's definition of "dealer" was ambiguous and resort to administrative materials was appropriate. The first reason was that prior to the bankruptcy court's decision in this case, there had been no reported decisions dealing with whether PACA applies to restaurants, even though the statute had been in existence since 1930. *Id.* at 843. The court's second reason is confusing, but appears to have had something to do with PACA's silence as to its applicability to restaurants. *Id.* The third reason was that PACA empowered the USDA to administer the statute by enacting regulations. *Id.* at 843-44. For the same reasons discussed herein, the *Italian Oven* court's first two reasons for looking beyond the plain statutory definition of "dealer" are unconvincing to us. Additionally, its third reason is irrelevant to an inquiry into the ambiguity of statutory text.

Ultimately, this case turns on whether the statutory definition of "dealer" found in PACA is unambiguous with respect to its inclusion of restaurants such as Magic. As discussed above, PACA states that subject to certain exceptions, a dealer is "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce...." 7 U.S.C. § 499a(b)(6). Because "the term 'person' includes individuals, partnerships, corporations, and associations," *id.* § 499a(b)(1), Magic is a "person" under PACA. Furthermore, the parties do not dispute that Magic purchased "wholesale or jobbing quantities" of produce, which USDA regulations define as "aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received." 7 C.F.R. § 46.2(x). Additionally, Magic does not contend that it falls within any of the three statutory exceptions to PACA's definition of "dealer." *See* 7 U.S.C. § 499a(b)(6)(A), (B), and (C).

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[7] This practice is further evidenced by USDA's communications with Magic. A July 6, 1995 letter to counsel for Magic from a USDA official apparently responsible for license and program review in the PACA Branch of USDA's Fruit and Vegetable Division explained that official's view that "[r]estaurants are not considered 'dealers,' 'brokers,' 'commission merchants' or any other entity whose operations are subject to the PACA," and that "[t]he PACA is not applicable to a restaurant that does not act as a central distributor for subsidiary restaurants irrespective of where it obtains it perishable commodities."

At oral argument in this case, it was suggested that Congress's employment of the words "engaged in the business of" in defining the category of "dealers" rendered this definition ambiguous, because this language could be interpreted to restrict the meaning of "dealer" to include only those engaged *primarily* in the business of buying or selling perishable agricultural commodities. However, nothing about the ordinary meaning of the words "engaged" or "business" indicates that the statutory definition should be understood to apply only to those engaged *primarily* in this business. This "engaged in the business of" language speaks to the *type* of business required to invoke jurisdiction under PACA, not to the *quantity* thereof. Congress spoke to quantity later in this definition, when it restricted the category of "dealers" to those doing business "in wholesale or jobbing quantities."[8]

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[8] The interpretation given to the definition of "dealer" in the Packers and Stockyards Act, 7 U.S.C. § 181 *et seq.* ("PSA"), lends additional support to this conclusion. PACA's trust provision was modeled on that of the PSA, and this court has previously observed that authority developed under the PSA is persuasive in interpreting PACA's trust. *See Consumers Produce,* 16 F.3d at 1382 n. 5. Using language nearly identical to that used in PACA, the PSA defines a "dealer" as "any person ... engaged in the business of buying or selling in commerce livestock at a stockyard...." *Id.* § 201(d). The only decision interpreting the PSA's "engaged in the business of" language of which we are aware confirms our interpretation of PACA's identical language. *See Kelley v. United States,* 202 F.2d 838, 841 (10th Cir.1953) ("engaged in the business of" language cannot be read to mean engaged in the *sole* business of); *see also United States v. Perdue Farms, Inc.,* 680 F.2d 277, 285 (2d Cir.1982) (interpreting PSA's nearly identical definition of "live poultry dealer," 7 U.S.C. § 218b (repealed 1987), and concluding that "rather than focusing upon the absolute amount of packing business or live poultry business a firm engaged in, Congress chose to make the USDA's jurisdiction dependent upon the activity of the business ..., no matter how small....").

There is therefore nothing ambiguous about the application of this statutory definition to the facts of this case. The district court's conclusion that the definition is ambiguous because it does not explicitly state whether restaurants are dealers is specious. Because Congress chose to define the word "dealer" in broad terms, rather than by specifically identifying each entity that falls into this category, does not automatically render the definition ambiguous.

B. The Statutory Purpose.

Even where the express language of a statute appears unambiguous, a court must look beyond that plain language where a literal interpretation of this language would thwart the purpose of the overall statutory scheme, *United States v. Jersey Shore State Bank,* 781 F.2d 974, 977 (3d Cir.1986), *aff'd,* 479 U.S. 442, 107 S.Ct. 782, 93 L.Ed.2d 800 (1987), would lead to an absurd result, *id.,* or would otherwise produce a result "demonstrably at odds with the intentions of the drafters," *Demarest v. Manspeaker,* 498 U.S. 184, 190, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991) (quoting *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 571, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982)).

Nevertheless, it cannot be seriously contended that holding that restaurants purchasing perishable agricultural commodities in wholesale or jobbing quantities, as defined by the Secretary, are "dealers" under PACA is contrary to the statute's purpose, absurd, or "demonstrably at odds with the intentions of the drafters." There is no clear evidence of legislative intent regarding treatment of such restaurants at the time the definition of "dealer" was originally enacted in 1930.

Indeed, the only such evidence of legislative intent is the statement contained in the 1995 House Agriculture Committee report that the Committee did not intend that restaurants be included within the definition of "retailers" enacted in the 1995 PACA Amendments Act. That statement, however, is confined to the amendment. This committee report was issued more than 30 years after the last time Congress modified the definition of "dealer" in any substantial way,[9] and dealt with issues wholly different from this definition. *See supra* note 5. This report language is not something "upon which other legislators might have relied in voting for or against" the statutory definition of "dealer," and cannot constitute evidence of the legislative intent behind that definition. *See Heintz v. Jenkins,* 514 U.S. 291, 298, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995). As the Supreme Court has observed, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price,* 361 U.S. 304, 313, 80 S.Ct. 326, 4 L.Ed.2d 334 (1960); *see also Pennsylvania Med. Society v. Snider,* 29 F.3d 886, 898 (3d Cir.1994). We therefore disregard this House committee report.

Moreover, requiring restaurants that purchase large quantities of produce to comply with PACA furthers the goals of the statute as amended in 1984. Although the original PACA was enacted to protect produce growers and producers, the 1984 amendments, including the trust provision, were enacted for the protection of all produce sellers and suppliers. Holding restaurant-purchasers responsible to produce sellers such as Bowie provides protection of produce suppliers up through the distribution chain and therefore furthers the purposes of the trust provision.

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[9] Pub L. No. 87-725, 1962 U.S.C.C.A.N. 2749, substituted "wholesale or jobbing quantities" for "carloads." Amendments in 1969, 1978, and 1981 increase the monetary amount under current section 499a(b)(6)(B) from $90,000 to $100,000, $100,000 to $200,000, and $200,000 to $230,000, respectively. *See* Pub.L. No. 97-98, 1981 U.S.C.C.A.N. (95 Stat.) 1213, 1269; Pub.L. No. 95-562, 1978 U.S.C.C.A.N. (92 Stat.) 2381; Pub.L. No. 91-107, 1969 U.S.C.C.A.N. 1225. In addition, the 1978 amendment inserted "other than potatoes" after "commodity" in current section 499a(b)(6)(C). *See* Pub L. No. 95-562, 1978 U.S.C.C.A.N. (92 Stat.) 2381.

Magic contends that if this court holds that restaurants are "dealers," and therefore subject to PACA, the repercussions would be "staggering" because "all of the hundreds of thousands of restaurants in this country" that have never applied for licenses under PACA "have been in direct violation of federal law, for decades." (Appellee's Br. at 18-19). To some extent, Magic may have a point. Under PACA, any person failing to obtain a license through inadvertence rather than wilfulness may "be permitted by the Secretary ... to settle his liability in the matter by the payment of fees due for the period covered by such violation and an additional sum, not in excess of $250, to be fixed by the Secretary...." 7 U.S.C. § 499c(b). Should the Secretary choose to pursue such violations, these licensing fees could add up to substantial amounts over the 70-year period in which PACA has been in force.

It is not clear how many restaurants actually purchase produce in "wholesale or jobbing quantities," and are therefore subject to PACA's licensing requirement. The parties have offered no evidence on this point. We suspect, however, that the number of restaurants that do so is far smaller than Magic contends. In addition, we would be very surprised if the Secretary chose to pursue enforcement of such violations retroactively. Even if the Secretary does attempt to enforce PACA's penalty provisions against these "violating" restaurants, the long history of non-enforcement against restaurants in this case may be sufficiently extraordinary as to permit restaurants to successfully argue the application of equitable estoppel or laches.

We recognize that the USDA has refused to exercise jurisdiction over restaurants pursuant to PACA for approximately seven decades. It is this benign neglect that is responsible for much of the confusion in this area. Nevertheless, we are constrained by PACA's unambiguous statutory language to hold that a restaurant such as Magic, which purchases produce in wholesale or jobbing quantities (and in excess of $230,000 per year), is a "dealer" under 7 U.S.C. § 499a(b)(6), and administrative interpretations contrary to this plain language are therefore not persuasive.

IV.

For the foregoing reasons, the January 6, 1999 order of the district court will be reversed, and the case remanded to the district court with instructions to reinstate the January 15, 1997 order of the bankruptcy court granting partial summary judgment in favor of Bowie. Each side to bear its own costs.

RENDELL, Circuit Judge, dissenting:

I respectfully dissent because I find the phrase "engaged in the business of buying or selling ..." to be susceptible of a different meaning from that given it by the majority.

Restaurants are engaged in the business of preparing and selling meals to customers. Not only is buying or selling perishables in large quantities not their primary business, it is *not their business at all.*[10] Admittedly, in the course of their business, they do buy perishables in great quantities. If PACA was intended to include them, Congress should have said, "any business that buys or sells ..."; it did not. As I read the statute, it confines the concept of "dealer" to those who do this as their bread and butter, so to speak. The majority reading would make most prisons "dealers," yet prisons are not engaged in the perishable commodity-buying business.

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[10] The majority relies by analogy upon the *Kelley* case, which found that the Packers and Stockyards Act did not require a dealer to be engaged solely in the business of selling livestock. *See Kelley v. United States*, 202 F.2d 838 (10th Cir.1953). This analogy is inapposite. In *Kelley*, the livestock dealer was clearly engaged in the business of selling (continued...)

The reading I have proffered, together with the majority's rejection of it, leads me to conclude that the statutory language is ambiguous. Once we have found an ambiguity in the statutory language, our resort to legislative history would confirm that PACA is not intended to cover restaurants and food service institutions. In discussing the definition of "retailer" (which relies in part on the definition of dealer), the House Report made clear that food service establishments such as restaurants or schools, hospitals, and other institutional cafeterias are not required to be licensed. The agency's construction of PACA is consistent with this position.[11] In

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[10] (...continued)
livestock. Kelley was a proprietor of a stockyard that, because it was private, was not *itself* subject to the Packers and Stockyards Act. *See id.* at 839. The Tenth Circuit Court of Appeals found that, by buying livestock from stockyards that *were* subject to the Act, Kelley became a "dealer" subject to the registration and bond requirements of the Act. *See id.* at 841. That is, the issue in *Kelley* was whether the livestock dealer had to be registered when his dealing in livestock subject to the Act was not his sole business due to the fact that his sales of *other* livestock might predominate. There is no question that the core of Kelley's business was dealing livestock, and this clearly distinguishes his case from the instant case where Magic's business is not dealing in produce.

[11] The majority notes that we "should not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms." *Ante* at 115 (quoting *Estate of Cowart v. Nicklos Drilling Co.,*
(continued...)

short, dealers and brokers are those whose business is in dealing in, or brokering, these items. They should be licensed and are subject to the Act. Magic is engaged in a very different business, and is not in my view subject to regulation as a "dealer" under PACA.

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[11] (...continued)
505 U.S. 469, 476, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992)). Here, however, the only unambiguous statement of Congressional intent appears in the House Report. The agency's position is consistent with the intent expressed in the legislative history. *See In re The Italian Oven, Inc.*, 207 B.R. 839, 843-44 (Bankr. W.D. Pa.1997) (describing agency position on, and legislative history of, the "dealer" provision of PACA).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

In re: MAGIC RESTAURANTS, INC., *et al.*, Debtors.	:	Chapter 11 Case Nos. 95-376 through 95-392 (HSB)
MAGIC AMERICAN CAFE, INC., and MAGIC RESTAURANTS, INC. Appellants,	:	
v.	:	C.A. No. 97-300-JJF
BOWIE PRODUCE CO., INC., Appellee.	:	

MEMORANDUM OPINION

January 6, 1999
Wilmington, Delaware

FARNAN, Chief Judge

Presently before the Court is the Appeal of Magic Restaurants, Inc. and Magic American Cafe, Inc. from the January 15, 1997 Order of the United States Bankruptcy Court for the District of Delaware granting summary judgment in favor of Appellee Bowie Produce Company. On appeal, Appellants raise the following issues: (1) whether the Bankruptcy Court erred in determining that Appellants, as restaurateurs, are subject to the provisions of the Perishable Agricultural Commodities Act of 1930 ("PACA"), 7 U.S.C. § 499, *et seq.*, and (2) whether the Bankruptcy Court erred in its January 15, 1997 Order by failing to identify which of the Appellants is liable to Appellee (D.I. 10). After review and consideration of the parties' arguments, the Court concludes that Appellants are not subject to the provisions of PACA and thus, the Bankruptcy Court's ruling is reversed. As such, Appellants' second issue on appeal is moot.

I. BACKGROUND

Appellants, directly or through their subsidiaries, develop, own and operate restaurants that offer "an upscale alternative to fast food restaurants" (D.I. 10). In the course of operating their business, Appellants received some of their produce from Appellee. Appellants contend that, during all relevant periods, they purchased their perishable agricultural commodities from local suppliers and did not act as a central distributor for individual subsidiary restaurants.

On April 6, 1995, Appellants filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. Pursuant to Sections 1107 and 1109 of the Bankruptcy Code, Appellants have continued to manage their businesses and assets as debtors in possession. By Order dated December 30, 1996, the

Bankruptcy Court confirmed the Appellants' Second Amended Chapter 11 Plan of Reorganization.

On May 1, 1995, Appellee commenced an adversary proceeding against Appellants seeking recovery of alleged trust monies under the Perishable Agricultural Commodities Act, 7 U.S.C. § 499, *et seq.* ("PACA"), in compensation for the sales of produce by Appellee to Appellants. On June 30, 1996, Appellants filed a Motion for Summary Judgment on the grounds that PACA did not apply to restaurants such as Appellants. By Opinion and Order dated June 18, 1996, the Bankruptcy Court denied Appellants' motion for summary judgment, holding that Appellants were subject to the provisions of PACA. Appellants sought leave of this Court to appeal the Bankruptcy Court's decision, and, by Opinion and Order dated November 1, 1996, this Court denied Appellants' request for leave to appeal.

Thereafter, the Adversary Proceeding was substantially resolved by the Bankruptcy Court's Order of January 15, 1997 granting summary judgment in favor of Appellee in the amount of approximately $97,000. On June 4, 1997, Appellants filed a Notice of Appeal of the January 15, 1997 Order (D.I. 1), and on August 8, 1997, Appellants submitted their Opening Brief on Appeal (D.I. 10) to which Appellee responded on December 3, 1997 (D.I. 18). Appellants submitted a Reply Brief on February 18, 1998 (D.I. 20).

II. DISCUSSION

Because the issues raised in this appeal are questions of law, they will be reviewed *de novo. In re AM International, Inc.,* 203 B.R. 898, 903 (D. Del. 1996).

The purpose of PACA, as enacted in 1930, was to encourage fair trading practices in the marketing of perishable commodities by, *inter alia,* providing for the collection of damages from any buyer or seller who failed to fulfill his contractual obligations. H.R. Rep. No. 543, 98th Cong., 2d Sess. 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 406. PACA was later amended to "increase the legal protection for unpaid sellers and suppliers of perishable agricultural commodities" by establishing a mechanism for the imposition of a trust in favor of sellers on the inventories of perishable agricultural commodities, the products derived therefrom, and the proceeds of sales of those commodities and products. 7 U.S.C. § 499e(c)(2). The trust vehicle provides sellers of the commodities with a means of recovery for unpaid purchases that is superior to all creditors, including secured creditors, provided that the seller gives written notice of intent to the purchaser to preserve the benefits of the trust. *Id.* at § 499e(c)(3).

As a prerequisite to recovery under PACA, the seller must establish that the purchaser of perishable agricultural commodities qualifies as a "commission merchant," "dealer" or "broker" under the Act. In this case, Appellee alleges that Appellants are "dealers" of produce and therefore subject to the provisions of PACA. In relevant part, PACA defines a dealer as:

> any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . . .

Id. at 499a(b)(6).

Recently, another court in this Circuit addressed the issue of PACA's applicability to restaurants. *See In re The Italian Oven, Inc.*, 207 B.R. 839 (Bankr. W.D. Pa. 1997). In a factually analogous case, the Bankruptcy Court for the Western District of Pennsylvania held that a restaurant was not a "dealer" within the meaning of PACA. *Id.* at 845. In arriving at this conclusion, the Court determined that because the terms of PACA are ambiguous regarding its applicability to restaurants, resort to secondary sources, such as agency regulations and commentary and legislative history, was necessary. *Id.* at 844. In this case, the Bankruptcy Court determined that the language of PACA is unambiguous, and as such, resort to secondary sources was inappropriate. *In re Magic Restaurants, Inc.*, 197 B.R. 455, 458 (Bankr. D.Del. 1996). Reading the plain language of PACA, the Bankruptcy Court found that Appellants were not expressly exempted from PACA's purview and thus subject to its provisions. *Id.*

The United Stated Department of Agriculture ("USDA") has promulgated regulations pursuant to section 499o of PACA, which entrusts the USDA with the administration of the Act. *See* 7 U.S.C. § 499o; 7 C.F.R. pt. 46. The United States Supreme Court has provided that when a court interprets a statute construed by an administrative agency, the court must undertake the following analysis:

> First, always the question is whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that Congress has not directly addressed the precise question at issue, *the court does not simply impose its own construction on the statute,* as would be

> necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984) (emphasis added). Considering the PACA statutory language, the Court determines that the statute is silent on the issue of whether restaurants qualify as "dealers" under PACA. The Court thus concurs with the conclusion of the Bankruptcy Court for the Western District of Pennsylvania that Congress has not directly spoken to the issue of PACA's applicability to restaurants. When determining the scope of a statute that is silent or ambiguous as to a specific issue, a court may "draw not only on the language of the statute but on the legislative history, the agency regulations adopted to implement the statute, and the agency comments made with respect to the regulations." *West v. Sullivan,* 973 F.2d 179, 185 (3d Cir. 1992).

Turning first to the USDA regulations promulgated pursuant to PACA, the regulations, like the statute, define "dealer" as someone "engaged in the business of buying or selling in wholesale or jobbing quantities in commerce." 7 C.F.R. 46.2(m). Although the statute does not further define the term "dealer," the regulations include a list of entities or persons who may be considered "dealers." The only category which could reasonably be considered to encompass Appellants is that of "[r]etailers, when the invoice cost of all purchases of produce exceeds $230,000 during a calendar year." *Id.* at § 46.2(m)(2). The regulations define a "retailer" as a "dealer engaged in the business of selling any perishable commodity at retail." *Id.* at § 46.2(j). Although the regulations do not define the term "selling . . . at retail," ***Black's Law Dictionary*** defines "retail" as "[a] sale for final consumption in contrast to a sale for further sale or processing (*i.e.* wholesale). A sale to the ultimate consumer." *Black's Law Dictionary* 1182 (5th ed. 1979). Finally, a recent case has defined a "consumer" as "one who uses (economic) goods, and so diminishes or destroys their utilities." *Hundred East Credit Corp. v. Eric Schuster Corp.*, 515 A.2d 246, 248 (N.J. Super. 1986); *see Italian Oven,* 207 S.R. at 843.

The Secretary of Agriculture, in responding to comments regarding the 1995 Amendments to PACA, addressed the issue of PACA's applicability to restaurants:

> Another commentator representing a major restaurant chain opposed the proposed rule because he thought the change might bring restaurants under the jurisdiction of the PACA, and argued that therefore, the economic impact of the rule has been underestimated. Restaurants traditionally have not been considered subject to PACA by USDA or Congress unless the buying arm of the restaurant is a separate legal entity, and is buying for and/or reselling the product to another entity. Since restaurants are not subject to the PACA, this change in the regulation will not impact restaurants. For the reasons stated, we are not making any changes to this final rule based on the above comments.

61 Fed. Reg. 13385, 13386 (March 27, 1996).

Appellants argue that they are not "dealers" or "retailers" of perishable agricultural commodities, contending that they are consumers of such commodities. Appellants assert that the agricultural commodities are converted into menu items, and their utility as raw agricultural products is destroyed. There is no dispute that Appellants purchase the perishable agricultural commodities from suppliers, prepare them for use in different foods and sell the resulting product. Further, there is no dispute that Appellants do not function as a central distributor of perishable agricultural commodities for individual subsidiary restaurants. Considering the USDA regulations, the Secretary of Agriculture's comments, the ordinary meaning of the terms "retail" and "consumer," and the "consumer" status of Appellants, the Court concludes that Appellants are not "dealers" or "retailers" within the terms of PACA.

Further support for this conclusion is found in the legislative history of PACA. PACA's legislative history reveals that Congress did not intend restaurants to be considered "retailers" under PACA. The House Report addressing a 1995 Amendment to PACA sets forth the view of the House Committee on Agriculture:

> Section 3 phases out license fees for retailers and grocery wholesalers. It defines the term "retailer" as a person who is a dealer engaged in the business of selling any perishable commodity at retail. . . . It is not the intent of the Committee that the definition of retailer be construed to include food service establishments such as restaurants, or schools, hospitals and other institutional cafeterias.

H.R. Rep. 104-207, 104th Cong., 1st Sess. (1995), 1995 U.S.C.C.A.N. 453.

III. CONCLUSION

After a consideration of the statutory language of PACA, the USDA's interpretation of the statute and PACA's legislative history, the Court concludes that Appellants are not subject to the provisions of PACA, and therefore, Appellee is not entitled to Appellants' trust assets. Accordingly, the Bankruptcy Court's January 15, 1997 Order granting summary judgment in favor of Appellee will be reversed.[1]

An appropriate Order will be entered.

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[1] Because the Court has reversed the Bankruptcy Court's Order of January 15, 1997, the issue of whether the Bankruptcy Court erred in failing to identify which of the Appellants is liable to Appellee is moot.

APPENDIX C

In the Matter of MAGIC RESTAURANTS, INC., et al.,
Debtors.
BOWIE PRODUCE CO., INC., Plaintiff,
v.
MAGIC AMERICAN CAFE, INC., and Magic Restaurants,
Inc., Defendants.

Civil Action No. 96-371-JJF.

United States District Court,
D. Delaware.

Nov. 1, 1996.

OPINION

FARNAN, Chief Judge.

Presently before the Court is the Motion for Leave to Appeal the June 18, 1996, Order of the United States Bankruptcy Court (Adversary Proceeding No. A-95-42) brought by Magic American Cafe, Inc. and Magic American Restaurants, Inc. For the reasons discussed, the Court will deny Magic's Motion.

Background

The Appellants, Magic American Cafe, Inc., and Magic American Restaurants, Inc. (collectively "Magic") are debtors in bankruptcy proceedings currently pending in the United States Bankruptcy Court. Magic filed its Chapter 11 petitions on April 7, 1995.

Bowie Produce Co., Inc. ("Bowie") commenced an adversary proceeding against Magic on May 1, 1995, contending that Bowie is the beneficiary of a statutory trust arising under the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.* ("PACA"). Bowie contends that, prior to the petition date, it delivered produce to Magic, and a statutory trust arose by virtue of Magic's failure to pay for the produce prior to Magic's entry into bankruptcy.

In response, Magic moved for summary judgment, asserting that PACA is not applicable to restaurants or restaurant operators because they are not "dealers" under PACA. The Bankruptcy Court denied Magic's motion for summary judgment, holding that Magic is a "dealer" under the plain meaning of the language in § 499a(b)(6) of PACA. Magic now seeks leave from this Court to pursue an interlocutory appeal of the Bankruptcy Court's decision denying Magic's motion for summary judgment.

Interlocutory Appeals in Bankruptcy Cases

The question before the Court is whether the Court should grant Magic leave to file an interlocutory appeal from the June 18 order, which denied summary judgment to Magic. The Court's jurisdiction to review orders of the Bankruptcy Court is governed by 28 U.S.C. § 158(a), which provides:

> The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title.

28 U.S.C. § 158(a) (emphasis added); *see* Bank. R. 8001. Pursuant to § 158(a), Magic must obtain leave of the court to pursue an interlocutory appeal. *Id.* Although § 158(a) fails to provide criteria for determining when leave to appeal should be granted, courts faced with interlocutory appeals in a bankruptcy context have applied by analogy the standards set forth in 28 U.S.C. § 1292(b) governing interlocutory appeals from district courts to the courts of appeal. *In re Delaware and Hudson Railway, Co.*, 96 B.R. 469, 472 (D. Del.1989); *First American Bank of New York v. Century Glove, Inc.*, 64 B.R. 958, 961 (D. Del.1986).

Under § 1292(b) leave to file an interlocutory appeal can be granted when the order at issue (1) involves a controlling question of law upon which there is (2) substantial difference of opinion, and (3) when immediate appeal from the order may materially advance the ultimate termination of the litigation. *Century Glove*, 64 B.R. at 962. Additionally, a district court shall entertain an appeal of an interlocutory judgment only where the appellant establishes that exceptional circumstances justify a departure from the basic policy of postponing the review until after the entry of final judgment. *Century Glove*, 64 B.R. at 961-62 (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475, 98 S.Ct. 2454, 2461, 57 L.Ed.2d 351 (1978)).

Magic asserts that it meets the requirements of § 1292(b) because (1) there is a controlling question of law, which is whether PACA applies to restaurants; (2) there is a lack of opinion on the issue presented despite the existence of PACA for more than 50 years, and Magic asserts that no other court has ruled on this precise issue; and (3) judicial interpretation of the issue would substantially advance this litigation because a result in Magic's favor would avoid the need to resolve several other complex legal and factual issues.

Bowie responds that Magic has failed to meet the § 1292(b) criteria because (1) Magic fails to assert any "exceptional circumstances," and (2) there is no substantial ground for disagreement concerning the application of PACA to Magic because a dearth of judicial interpretation alone is insufficient to justify an interlocutory appeal.

The Court concludes that Magic has failed to demonstrate that it meets the § 1292(b) requirements. Although the Court is persuaded that a controlling question of law is presented here--whether PACA applies to restaurants and restaurant owners--Magic has failed to sufficiently demonstrate that exceptional circumstances exist which justify the need for immediate review. Although Magic asserts that determining this issue now would save time and avoid having to resolve other factual and legal matters, Magic has not sufficiently established an urgency that sets this case apart from the typical case.

Further, although Magic asserts that the lack of judicial opinion militates in favor of allowing an interlocutory appeal, the Court concludes that a scarcity or void of judicial opinion alone is insufficient to justify an interlocutory appeal. Furthermore, other courts have determined that a finding that a dearth of opinion exists as well as a judicial conflict on the issue is required to conclude that substantial ground for difference of opinion exists. *See Century Glove*, 64 B.R. at 962. No such circumstance has been asserted here.

In sum, a party seeking leave to pursue an interlocutory appeal must demonstrate, in the context of the factors cited above, some circumstance or reason that distinguishes the case from the procedural norm and establishes the need for immediate review. Magic has not done so.

Conclusion

For the reasons discussed, Magic's Motion for Leave to Appeal will be denied.

APPENDIX D

In the Matter of MAGIC RESTAURANTS, INC., et al.,
Debtors.
BOWIE PRODUCE CO., INC., Plaintiff,
v.
MAGIC AMERICAN CAFE, INC. and
Magic Restaurants, Inc., Defendants.

Bankruptcy Nos. 95-376 (HSB) to 95-392 (HSB).
Adv. No. A-95-42.

United States Bankruptcy Court,
D. Delaware.

June 18, 1996.

MEMORANDUM OPINION AND ORDER

HELEN S. BALICK, Chief Judge.

Defendants Magic American Cafe, Inc. and Magic Restaurants, Inc. have moved for summary judgment on the complaint of plaintiff Bowie Produce Co., Inc. This is the court's Opinion in this core proceeding. 28 U.S.C. § 157(b)(2)(B) & (K).

I. LEGAL STANDARD

In considering defendants' motion for summary judgment, the court will view the record and the inferences therefrom in the light most favorable to Bowie. *Hon v. Stroh Brewery Co.,* 835 F.2d 510, 512 (3d Cir.1987). The record consists of the admissions in the pleadings, two affidavits, and various letters. If this record shows no genuine issue as to any material fact, and that the defendants are entitled to judgment as a matter of law, then summary judgment shall be granted. Fed. R. Bankr.

P. 7056(c). In this motion, the defendants raise a legal issue, which if meritorious, would be sufficient to dismiss the complaint with prejudice.

II. FACTS

Magic Restaurants, Inc. (MRI) develops, owns, and operates restaurants. MRI presently operates several restaurants located in the Washington, D.C. and New York metropolitan areas. These restaurants generated twenty million dollars in sales in a recent six month period. MRI is the parent of Magic American Cafe (Cafe). Cafe operates its own restaurants and derives profits therefrom. Cafe and MRI filed Chapter 11 petitions in this court on April 7, 1995.

Cafe and MRI receive perishable agricultural commodities in interstate commerce. For example, MRI receives red peppers, and uses the peppers to create menu items such as Mediterranean sword with spicy red pepper sauce,[1] and linguini tossed in sesame dressing with red peppers. These and other meals, combined with drinks and desserts, and presented in a relaxed atmosphere, are designed to provide MRI's customers with a positive dining experience. Prior to the petition date, plaintiff Bowie Produce Co., Inc. delivered to MRI or Cafe certain perishable agricultural commodities that Bowie alleges were worth about $108,000. While it is unclear from the complaint and the briefing, apparently about $99,000 of that amount remains unpaid.

III. THE COMPLAINT

In its complaint, Bowie alleges it is the beneficiary of a trust for the unpaid amount created pursuant to the Perishable

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[1] This dish is also garnished with a Feta Mint Yogurt Sauce.

Agricultural Commodities Act, 7 U.S.C. § 499a *et seq.* ("PACA"). Bowie seeks immediate payment of $98,983.74 from this trust, or alternatively, "to turn over" the trust assets. Bowie also seeks prejudgment interest and attorneys' fees. Initially Bowie named only Cafe as a defendant, but later added MRI as a second defendant. There is an ongoing dispute between the parties concerning the proper defendant; however, that dispute is not germane to this motion. The court reads each allegation in the complaint referring to "defendant" as meaning both Cafe and MRI. In addition to denying most of the complaint's allegations, the defendants raise several affirmative defenses, including that they are not "dealers," and thus not subject to PACA.

IV. DISCUSSION

The statutory basis for Bowie's claim, PACA, requires that Cafe or MRI be a "commission merchant," "broker," or "dealer." 7 U.S.C. § 499e(a) (creating cause of action for damages), § 499e(c)(2) (creating trust for the benefit of unpaid suppliers or sellers of PACA goods). Bowie asserts each defendant is a "dealer" under PACA. The defendants disagree.

Section 499a(b)(6) of Title Seven defines a dealer:

> The term dealer means any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce, except that ... (B) no person buying any such commodity solely for sale at retail shall be considered as a 'dealer' until the invoice cost of his purchases of perishable agricultural

> commodities in any calendar year are in excess of $230,000.

The term "person" includes corporations. 7 U.S.C. § 499a(b)(1). The court does not understand the defendants' summary judgment motion to challenge any of the factual predicates to this definition. Instead, in their motion, the defendants maintain that neither is a dealer, because in their view, a restaurant simply cannot be a "dealer."

The language of section 499a(b)(6) is unambiguous, and nothing in the definition carves out entities such as the defendants or restaurants. Nonetheless, the defendants insist that the "plain language" of the statute is not satisfied. Their argument is somewhat complicated and contorted, but can best be described as having at least three conjunctive prongs.

The defendants first argue the only portion of this section that could apply is subsection 499a(6)(B), which is quoted above. For the purposes of judicial efficiency, the court will assume this prong is correct.

Next, they refer to a regulation promulgated by the United States Department of Agriculture which states:

> 'Dealer' means any person engaged in the business of buying or selling in wholesale or jobbing quantities in commerce and includes:
>
> * * * * * *
>
> Retailers, when the invoice cost of all purchases of produce exceeds $230,000 during the calendar year.

7 C.F.R. § 46.2(m). The defendants argue that subsection 499a(6)(B) should be construed no broader than the above USDA regulation (the "scope argument"). The court cannot agree with this scope argument, as this PACA subsection is equally unambiguous, and includes no terms that require further definition to apply to the defendants here. As is further discussed below, the defendants buy PACA produce "solely for sale at retail," 7 U.S.C. § 499a(6)(B) and thus fall squarely within the purview of PACA.

However, the court will alternatively assume the correctness of the defendants' above scope argument, to get to the meat of the defendants' argument in this summary judgment motion, which is that neither defendant is a "retailer" within the meaning of the USDA regulations.[2]

The USDA defines a retailer as: "a person engaged in the business of selling to consumers only." 7 C.F.R. § 46.2(j). While this definition appears to match the defendants' situation perfectly, the defendants instead argue that they are "consumers" themselves, and thus cannot be persons selling to a consumer. "Consumers" is not defined in either the regulations or the PACA statute. For the purposes of this motion, the court will accept the defendants' proffered definition: "One who uses (economic) goods and so diminishes or destroys their utilities." Memorandum of Law, docket no. 15 at 10-11 (citing case law).

From this definition, defendants argue: "A restaurant, by purchasing various raw ingredients and utilizing them to prepare its menu items, diminishes the utility of the supplied ingredients." Docket no. 15 at 10. Elsewhere, they similarly argue: "A restaurant, by using the produce supplied by dealers or wholesalers such as Bowie and thus eliminating any further utility for that produce, serves as the consumer and thus is not covered under PACA's framework." *Id.* at 11. These arguments fail.

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[2] The defendants do not dispute that the aggregate invoice price of the produce purchased by either defendant exceeds the $230,000 per year threshold.

Each defendant, by purchasing various raw ingredients and utilizing them to prepare its respective menu items, enhances the utility of the supplied ingredients. It is an eminently reasonable inference that the defendants' Mediterranean sword with spicy red pepper sauce is far more appetizing, and therefore far more useful[3] to hungry customers than a platter of the raw ingredients. Similarly, on a purely economic scale, it is a reasonable inference that the ingredients comprising this dish cost a lot less than the $5.25 menu price for Mediterranean sword. Docket no. 15, Exhibit A. While customers may dine for more sophisticated reasons than mere usefulness, few things are more useful to a growling stomach than a savory meal. The defendants themselves believe that their entrees offer "a positive dining experience." Docket no. 15 at 10. The defendants' customers are the true consumers (no pun intended), as only after this consumption phase is the produce truly destroyed and no longer utile.

Other portions of defendants' briefing also support this result. They refer to Bowie as a true "wholesaler" that sells to MRI or Cafe. *Id.* at 11. Yet if the defendants were truly consumers, then the retailer link in the economic distribution chain would have disappeared, a scenario suggesting that Bowie is a retailer.

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[3] Utile is defined as "useful." *E.g.*, Webster's II New Riverside University Dictionary 1272 (1984).

In summary, the arguments that the defendants have cooked up and served to the court are unpalatable. Applying the plain meaning of PACA to the facts here, each defendant is a "dealer."[4]

The defendants also argue that the legislative history of PACA demonstrates that PACA was not intended to apply to restaurants. In light of the plain meaning of the statute and the court's rulings above, there is no need to examine this argument. *E.g., United States v. Ron Pair Enterprises,* 489 U.S. 235, 240-41, 109 S.Ct. 1026, 1029-30, 103 L.Ed.2d 290 (1989) (legislative history should be examined only when statutory language is ambiguous).

Finally, the defendants argue that a July 6, 1995 letter from the Washington, D.C. office of the fruit and vegetable branch of the USDA supports their position that they are not "dealers." Assuming that the letter supports the defendants' legal position, it has no weight here for three reasons. First, an administrative agency's view should be considered only if the statute is ambiguous, which is not the case here. *Mead Corp. v. B.E. Tilley,* 490 U.S. 714, 722, 109 S.Ct. 2156, 2161-62, 104 L.Ed.2d 796 (1989). Second, this letter was not promulgated after a due process proceeding. *Chevron U.S.A. v. Natural Res. Def. Council,* 467 U.S. 837, 840, 843-45, 104 S.Ct. 2778, 2780, 2781-83, 81 L.Ed.2d 694 (1984). Third, Bowie has submitted a later and conflicting letter on the "dealer" issue. Thus, the July 6 letter hardly represents a clear statement representing the considered opinion of the USDA. 490 U.S. at 722, 109 S.Ct. at 2161-62.

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[4] The parties' briefs argue whether each defendant should be characterized as a "restaurant." The court has intentionally avoided the use of that term in its analysis, as this issue is a red herring.

V. Conclusion

The motion for summary judgment is without merit. An order in accordance with this Opinion is attached.

ORDER

AND NOW, June 18, 1996, for the reasons stated in the attached Memorandum Opinion, IT IS ORDERED THAT:

1. The motion for summary judgment of Magic American Cafe, Inc. (docket no. 14), and later joined by Magic Restaurants, Inc. (docket no. 36) is DENIED.

2. Counsel for each party shall be present in the courtroom on June 24, 1996 at 9:00 a.m. to give a status report on this adversary. This status report shall be listed first on the agenda for that Magic Restaurants hearing.

APPENDIX E

In the Matter of MAGIC RESTAURANTS, INC., et al.,
Debtors.
BOWIE PRODUCE CO., INC., Plaintiff,
v.
MAGIC AMERICAN CAFE, INC., and Magic Restaurants, Inc., Defendants.

Bankruptcy Nos. 95-376 to 95-392.
Adversary No. A-95-42.

United States Bankruptcy Court,
D. Delaware.

Jan. 15, 1997.

ORDER

HELEN S. BALICK, Chief Judge.

1. The plaintiff Bowie Produce Inc. filed a motion for summary judgment. The motion alleges that:

   a. Bowie is a creditor of the defendant, Magic American Cafe, Inc. and Magic Restaurants, Inc. ("Magic").

   b. Bowie is a beneficiary of the trust that Magic was required to establish under the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499e(c)(2) in the amount of $98,983.74. This section states in part:

   > Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural

> commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers ... until full payment of the sums owing in connection with such transactions has been received....

c. Bowie preserved its trust rights under PACA, by timely filing the requisite notices of intent to preserve trust benefits with the secretary of agriculture and serving Magic with copies.

d. PACA trust assets are required to be paid to Bowie outside the distribution contemplated under the Plan of Reorganization.

2. In considering Bowie's motion for summary judgment, the court will view the record and the inferences therefrom in a light most favorable to Magic. *Hon v. Stroh Brewery Co.,* 835 F.2d 510, 512 (3d Cir.1987). If the record shows no genuine issue as to any material fact, and that Bowie is entitled to judgment as a matter of law, then summary judgment shall be granted. Fed. R. Bankr. P. 7056(c).

3. With its motion for summary judgment, Bowie submitted copies of the notices of intent that were filed with the secretary of agriculture to preserve trust benefits. The notices of intent include invoices that Magic owed Bowie. Bowie asserts that these notices and invoices show that it preserved its trust rights under PACA, and that Magic owes Bowie $98,983.74.

4. As to invoices which total $93,173.29, Magic does not dispute that Bowie preserved its trust rights under PACA and is due a payment.

5. Magic does dispute that Bowie preserved its trust rights under PACA in the remaining 27 invoices, which total $5,810.45, for the following reasons. Magic filed schedules of assets and liabilities with this court. Docket No. 206. Schedule F of assets and liabilities lists invoices Magic acknowledges were owing at the petition date. The invoices that Bowie asserts are owing and that total $5,810.45 were not listed on Magic's schedules. Thus, Magic argues that summary judgment should be denied because the differences between the invoices submitted by Bowie and Magic's schedules show that there are genuine issues of material fact.

6. Bowie argues that merely noting that certain invoices do not appear on schedule F is insufficient to create a genuine dispute of fact without an affidavit by a knowledgeable person explaining that the books were reviewed and these invoices are not due.

7. The question to be decided is whether the schedules of assets and liabilities submitted to the court are sufficient to show an issue of material fact and thus preclude summary judgment in Bowie's favor as to the $5,810.45 amount. Bankruptcy Rule 7056 sets out the type of evidence allowed when considering a motion for summary judgment. Rule 7056(c) provides in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law.

8. Schedule F, the specific schedule referred to by Magic, was filed as a part of the debtors' schedules of assets and liabilities

as required by Bankruptcy Rule 1007(b)(1) which states that "the debtor, unless the court orders otherwise, shall file schedules of assets and liabilities...."

9. In addition, an affidavit by Steve R. Jakubowski, Chief Operation Officer of Magic Restaurant Inc. was submitted with the schedules. This affidavit states that "I, the Chief Operating Officer of the corporation ... named as debtor in this case, declare under penalty of perjury that I have read the foregoing summary and schedules ..., and that they are true and correct to the best of my knowledge, information, and belief." Under Rule 7056, therefore, the schedule coupled with the affidavit may be considered together in this motion for summary judgment.

10. Therefore, there is a genuine issue of material fact as to whether the 27 invoices, which total $5,810.45, are unpaid.[1]

11. Bowie has preserved its right under PACA for the amount of $93,173.29 and therefore summary judgment is GRANTED as to the invoices totaling this amount. Summary judgment is DENIED as to the remaining invoices, which total $5,810.45.

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[1] The following are the invoices in dispute: A268562, A268981, A273984, A274799, A304891, A304981, A304733, A304762, A304829, A304884, A305055, A305067, A305039, A305065, A305110, A305184, A305064, A305165, A305332, A305481, A305558, A305420, A305391, A305437, A305383, A305341 and A287102.

APPENDIX F

UNITED STATES CODE
Title 7, Ch. 20A
Perishable Commodities

§ 499a. Short title and definitions

(a) Short title

This chapter may be cited as the "Perishable Agricultural Commodities Act, 1930".

(b) Definitions

For purposes of this chapter:

(1) The term "person" includes individuals, partnerships, corporations, and associations.

(2) The term "Secretary" means the Secretary of Agriculture.

(3) The term "interstate or foreign commerce" means commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia.

(4) The term "perishable agricultural commodity" —

(A) Means any of the following, whether or not frozen or packed in ice: Fresh fruits and fresh vegetables of every kind and character; and

(B) Includes cherries in brine as defined by the Secretary in accordance with trade usages.

(5) The term "commission merchant" means any person engaged in the business of receiving in interstate or foreign commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another.

(6) The term "dealer" means any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce, except that (A) no producer shall be considered as a "dealer" in respect to sales of any such commodity of his own raising; (B) no person buying any such commodity solely for sale at retail shall be considered as a "dealer" until the invoice cost of his purchases of perishable agricultural commodities in any calendar year are in excess of $230,000; and (C) no person buying any commodity other than potatoes for canning and/or processing within the State where grown shall be considered a "dealer" whether or not the canned or processed product is to be shipped in interstate or foreign commerce, unless such product is frozen or packed in ice, or consists of cherries in brine, within the meaning of paragraph (4) of this section. Any person not considered as a "dealer" under clauses (A), (B), and (C) may elect to secure a license under the provisions of section 499c of this title, and in such case and while the license is in effect such person shall be considered as a "dealer".

(7) The term "broker" means any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser,

respectively, except that no person shall be deemed to be a "broker" if such person is an independent agent negotiating sales for and on behalf of the vendor and if the only sales of such commodities negotiated by such person are sales of frozen fruits and vegetables having an invoice value not in excess of $230,000 in any calendar year.

(8) A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this chapter.

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected in the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity

subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

(10) The terms "employ" and "employment" mean any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.

(11) The term "retailer" means a person that is a dealer engaged in the business of selling any perishable agricultural commodity at retail.

(12) The term "grocery wholesaler" means a person that is a dealer primarily engaged in the full-line wholesale distribution and resale of grocery and related nonfood items (such as perishable agricultural commodities, dry groceries, general merchandise, meat, poultry, and seafood, and health and beauty care items) to retailers. However, such term does not include a person described in the preceding sentence if the person is primarily engaged in the wholesale distribution and resale of perishable agricultural commodities rather than other grocery and related nonfood items.

(13) The term "collateral fees and expenses" means any promotional allowances, rebates, service or materials fees paid or provided, directly or indirectly, in connection with the distribution or marketing of any perishable agricultural commodity.

(June 10, 1930, c. 436 § 1, 46 Stat. 531; Apr. 13, 1934, c. 120, § 1, 48 Stat. 584; Aug. 20, 1937, c. 719, § 1, 50 Stat. 725; June 29, 1940, c. 456, §§ 1, 2, 54 Stat. 696; Oct. 1, Pub.L. 87-725, §§ 1, 2, 76 Stat. 673; Nov. 4, 1969, Pub.L. 91-107, §§ 1, 2, 83 Stat. 182; Nov. 1, 1978, Pub.L. 95-562, § 1, 92 Stat. 2381; Dec. 22, 1981, Pub.L. 97-98, Title XI, § 1011(1), 105 Stat.

1898; Nov. 15, 1995, Pub.L. 104-48, §§ 2, 9(a), 12(a), 109 Stat. 424, 429, 430.)

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

(1) For any commission merchant, dealer, or broker to engage in or use any unfair, unreasonable, discriminatory, or deceptive practice in connection with the weighing, counting, or in any way determining the quantity of any perishable agricultural commodity received, bought, sold, shipped, or handled in interstate or foreign commerce.

(2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer.

(3) For any commission merchant to discard, dump, or destroy without reasonable cause, any perishable agricultural commodity received by such commission merchant in interstate or foreign commerce.

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any

such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

(5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce. However, any commission merchant, dealer, or broker who has violated--

(A) any provision of this paragraph may, with the consent of the Secretary, admit the violation or violations; or

(B) any provision of this paragraph relating to a misrepresentation by mark, stencil, or label shall be permitted by the Secretary to admit the violation or violations if such violation or violations are not repeated or flagrant;

and pay, in the case of a violation under either clause (A) or (B) of this paragraph, a monetary penalty not to exceed $2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited in the Treasury of the United States as miscellaneous receipts. A person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of this paragraph by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation.

(6) For any commission merchant, dealer, or broker, for a fraudulent purpose, to remove, alter, or tamper with any card, stencil, stamp, tag, or other notice placed upon any container or railroad car containing any perishable agricultural commodity, if such card, stencil, stamp, tag, or other notice contains a certificate or statement under authority of any Federal or State inspector or in compliance with any Federal or State law or regulation as to the grade or quality of the commodity contained in such container or railroad car or the State or country in which such commodity was produced.

(7) For any commission merchant, dealer or broker, without the consent of an inspector, to make, cause, or permit to be made any change by way of substitution or otherwise in the contents of a load or lot of any perishable agricultural commodity after it has been officially inspected for grading and certification, but this shall not prohibit re-sorting and discarding inferior produce.

(June 10, 1930, c. 436, § 2, 46 Stat. 532; Apr. 13, 1934, c. 120, §§ 2, 3, 48 Stat. 585; June 19, 1936, c. 602, § 1, 49 Stat. 1533; Aug. 20, 1937, c. 719, §§ 2 to 4, 50 Stat. 725, 726; June 29, 1940, c. 456, §§ 3, 4, 54 Stat. 696; Apr. 6, 1942, c. 211, 56 Stat. 200; July 30, 1956, c. 786, § 1, 70 Stat. 726; Aug. 10, 1974, Pub.L. 93-369, 88 Stat. 423; Oct. 18, 1982, Pub.L. 97-352, § 1, 96 Stat. 1667; May 7, 1984, Pub.L. 98-273, § 2, 98 Stat. 166; Nov. 15, 1995, Pub.L. 104-48, §§ 9(b), 10, 109 Stat. 430.)

§ 499b-1. Products produced in distinct geographic areas

(a) In general

In the case of a perishable agricultural commodity (as defined under the Perishable Agricultural Commodity Act (7 U.S.C. 499a(4))--

(1) subject to a Federal marketing order under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*);

(2) traditionally identified as being produced in a distinct geographic area, State, or region; and

(3) the unique identity, based on such distinct geographic area, of which has been promoted with funds collected through producer contributions pursuant to such marketing order,

no person may use the unique name or geographical designation of such commodity to promote the sale of a similar commodity produced outside such area, State, or region.

(b) Penalties

A violation of this section shall be considered a violation of paragraphs (4) and (5) of section 2 of the Perishable Agricultural Commodities Act (7 U.S.C. 499b(4) and (5)).

(c) Reimbursement

A person bringing a complaint under this section shall reimburse the Secretary of Agriculture for any and all costs associated with the enforcement of this section.

(d) Prohibition

The Secretary of Agriculture shall not increase any fees charged under the Perishable Agricultural Commodities Act (7 U.S.C. 499 *et seq.*) to offset costs associated with the operation of this section.

(e) Regulations

The Secretary shall promulgate regulations to carry out this section.

(Pub.L. 101-624, Title XIII, § 1309, Nov. 28, 1990, 104 Stat. 3562.)

§ 499c. Licenses

(a) License required; penalties for violations

After December 10, 1930, no person shall at any time carry on the business of a commission merchant, dealer, or broker without a license valid and effective at such time. Any person who violates any provision of this subsection shall be liable to a penalty of not more than $1,000 for each such offense and not more than $250 for each day it continues, which shall accrue to the United States and may be recovered in a civil suit brought by the United States.

Any person violating this provision may, upon a showing satisfactory to the Secretary of Agriculture, or his authorized representative, that such violation was not willful but was due to inadvertence, be permitted by the Secretary, or such representative, to settle his liability in the matter by the payment of the fees due for the period covered by such violation and an additional sum, not in excess of $250, to be fixed by the Secretary of Agriculture or his authorized representative. Such payment shall be deposited in the

Treasury of the United States in the same manner as regular license fees.

(b) Application and fees for licenses

(1) Application for license

Any person desiring any such license shall make application to the Secretary. The Secretary may by regulation prescribe the information to be contained in such application and to be furnished thereafter.

(2) License fees

Upon the filing of an application under paragraph (1), the applicant shall pay such license fees, both individually and in the aggregate, as the Secretary determines necessary to meet the reasonably anticipated expenses for administering this chapter and the Act to prevent the destruction or dumping of farm produce, approved March 3, 1927 (7 U.S.C. 491-497). Thereafter, the licensee shall pay such license fees annually or at such longer interval as the Secretary may prescribe. The Secretary shall take due account of savings to the program when determining an appropriate interval for renewal of licenses. The Secretary shall establish and alter license fees only by rulemaking under section 553 of Title 5, except that the Secretary may not alter the fees required under paragraph (3) or (4) for retailers and grocery wholesalers that are dealers. Effective on November 15, 1995, and until such time as the Secretary alters such fees by rule, an individual license fee shall equal $550 per year, plus $200 for each branch or additional business facility operated by the applicant in excess of nine such facilities, as determined by the Secretary, subject to an annual aggregate limit of $4,000 per licensee. Any increase in license fees prescribed by the Secretary under this paragraph shall not take effect unless the Secretary determines that, without such increase, the funds on hand as of the end of the fiscal year in which the increase takes effect will be less than 25 percent of the projected budget to administer this chapter and such Act for the next fiscal year. In no case may a license fee increase by the Secretary take effect before the end of the three-year period beginning on November 15, 1995.

(3) One-time fee for retailers and grocery wholesalers that are dealers

During the three-year period beginning on November 15, 1995, a retailer or grocery wholesaler making an initial application for a license under this section shall pay the license fee required under subparagraph (A), (B), or (C) of paragraph (4) for license renewals in the year in which the initial application is made. After the end of such period, a retailer or grocery wholesaler making an initial application for a license under this section shall pay an administrative fee equal to $100. In either case, a retailer or grocery wholesaler paying a fee under this paragraph shall not be required to pay any fee for renewal of the license for subsequent years.

(4) Gradual elimination of annual fees for retailers and grocery wholesalers that are dealers

In the case of a retailer or grocery wholesaler that holds a license under this section as of November 15, 1995, payments for the renewal of the license shall be made pursuant to the following schedule:

(A) For anniversary dates occurring during the one-year period beginning on November 15, 1995, the licensee shall pay a renewal fee in an amount equal to 100 percent of the applicable renewal fee (subject to the $4,000 aggregate limit on such payments) in effect under this subsection on the day before November 15, 1995.

(B) For anniversary dates occurring during the one-year period beginning at the end of the period in subparagraph (A), the licensee shall pay a renewal fee in an amount equal to 75 percent of the amount paid by the licensee under subparagraph (A).

(C) For anniversary dates occurring during the one-year period beginning at the end of the period in subparagraph (B), the licensee shall pay a renewal fee in an amount equal to 50 percent of the amount paid by the licensee under subparagraph (A).

(D) After the end of the three-year period beginning on November 15, 1995, the licensee shall not be required to pay any fee if the licensee seeks renewal of the license.

(5) Perishable Agricultural Commodities Act Fund

Such fee, when collected, shall be deposited in the Treasury of the United States as a special fund, without fiscal year limitation, to be designated as the "Perishable Agricultural Commodities Act Fund", which shall be available for all expenses necessary to the administration of this chapter, and the Act approved March 3, 1927 [7 U.S.C.A. § 491 *et seq.*], referred to above. Any reserve funds in the Perishable Agricultural Commodities Act Fund may be invested by the Secretary in insured or fully-collateralized interest-bearing accounts or, at the discretion of the Secretary, by the Secretary of the Treasury in United States Government debt instruments. Any interest earned on such reserve funds shall be credited to the Perishable Agricultural Commodities Act Fund and shall be available for the same purposes as the fees deposited in such fund. Financial statements prescribed by the Director of the Office of Management and Budget for the last completed fiscal year, and as estimated for the current and ensuing fiscal years, shall be included in the budget as submitted to the Congress annually.

(c) Use of trade names

A licensee may conduct business in more than one trade name or change the name under which business is conducted without requiring an additional or new license. The Secretary may disapprove the use of a trade name if, in his opinion, the use of the trade name by the licensee would be deceptive, misleading, or confusing to the trade, and the Secretary may, after notice and opportunity for a hearing, suspend for a period not to exceed ninety days the license of any licensee who continues to use a trade name which the Secretary has disapproved for use by such licensee. The Secretary may refuse to issue a license to an applicant if he finds that the trade name in which the applicant proposes to do business would be deceptive, misleading, or confusing to the trade if used by such applicant.

(June 10, 1930, c. 436, § 3, 46 Stat. 533; Aug. 20, 1937, c. 719, § 5, 50 Stat. 726; June 15, 1950, c. 254, § 1, 64 Stat. 217; July 30, 1956, c. 786, § 2(a), 70 Stat. 726; Oct. 1, 1962, Pub.L. 87-725, §§ 3, 4, 76 Stat. 673, 674; Nov. 4, 1969, Pub.L. 91-107, § 3, 83 Stat. 182; 1970 Reorg. Plan No. 2, § 102, eff. July 1, 1970, 35 F.R. 7959, 84 Stat. 2085; Nov. 1, 1978, Pub.L. 95-562, § 2, 92 Stat. 2381; Dec. 22, 1981, Pub.L. 97-98, Title XI, § 1115(b), 95 Stat. 1269; Aug. 22, 1988, Pub.L. 100-414, § 1, 102 Stat. 1102; Nov. 28, 1990, Pub.L. 101-624, Title XIII, § 1361, 104 Stat. 3568; Nov. 15, 1995, Pub.L. 104-48, §§ 3, 4(a), (b), 5(a), 109 Stat. 425, 426, 427.)

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required): *Provided*, That notice of the necessity of renewing the license and of paying the renewal fee (if such fee is required) shall be mailed at least thirty days before the anniversary date: *Provided, further*, That if the renewal fee (if required) is not paid by the anniversary date the licensee may obtain a renewal of that license at any time within thirty days by paying the fee provided in section 499c(b) of this title, plus $50, which shall be deposited in the Perishable Agricultural Commodities Act fund provided for by section 499c(b) of this title: *And provided further*, That the license of any licensee shall terminate upon said licensee, or in case the licensee is a partnership, any partner, being discharged as a bankrupt, unless the Secretary finds upon examination of the circumstances of such bankruptcy, which he shall examine if requested to do so by said licensee, that such circumstances do not warrant such termination.

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who--

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension;

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect;

(C) within two years prior to the date of the application, has been found guilty in a Federal court of having violated the provisions of sections 491, 493 to 497 of this title, relating to the prevention of destruction and dumping of farm produce; or

(D) has failed, except in the case of bankruptcy and subject to his right of appeal under section 499g(c) of this title, to pay any reparation order issued against him within two years prior to the date of the application.

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

Any applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

(d) Withholding license pending investigation

The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or (b) whether the application contains any materially false or misleading statement or involves any misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee of the applicant. If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or because the application contains a materially false or misleading statement made by the applicant or by its representative on its behalf, or involves a misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee, the Secretary may refuse to issue a license to the applicant.

(e) Refusal of license

The Secretary may refuse to issue a license to an applicant if he finds that the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, has, within three years prior to the date of the application, been adjudicated or discharged as a bankrupt, or was a general partner of a partnership or officer or holder of more than 10 per centum of the stock of a corporation adjudicated or discharged as a bankrupt, and if he finds that the circumstances of such bankruptcy warrant such a refusal, unless the applicant furnishes a bond of such nature and amount as may be determined by the Secretary or other assurance satisfactory to the Secretary that the business of the applicant will be conducted in accordance with this chapter.

(June 10, 1930, c. 436, § 4, 46 Stat. 533; Apr. 13, 1934, c. 120, §§ 4-7, 48 Stat. 585, 586; June 19, 1936, c. 602, § 2, 49 Stat. 1533; Aug. 20, 1937, c. 719, § 6, 50 Stat. 726; June 15, 1950, c. 254, § 2, 64 Stat. 218; July 30, 1956, c. 786, §§ 2(b), 3, 4, 70 Stat. 726; Oct. 1, 1962, Pub.L. 87-725, §§ 5 to 7, 76 Stat. 674; Nov. 6, 1978, Pub.L. 95-598, Title III, § 303, 92 Stat. 2673; Dec. 13, 1991, Pub.L. 102-237, Title X, § 1011(2), 105 Stat. 1898; Nov. 15, 1995, Pub.L. 104-48, §§ 4(c), 5(b), 12(c), 109 Stat. 427, 431.)

§ 499e. Liability to persons injured

(a) Amount of damages

If any commission merchant, dealer, or broker violates any provision of section 499b of this title he shall be liable to the person or persons injured thereby for the full amount of damages (including any handling fee paid by the injured person or persons under section 499f(a)(2) of this title) sustained in consequence of such violation.

(b) Remedies

Such liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this chapter are in addition to such remedies.

(c) Trust on commodities and sales proceeds for benefit of unpaid suppliers, sellers, or agents; preservation of trust; jurisdiction of courts

(1) It is hereby found that a burden on commerce in perishable agricultural commodities is caused by financing arrangements under which commission merchants, dealers, or brokers, who have not made payment for perishable agricultural commodities purchased, contracted to be purchased, or otherwise handled by them on behalf of another person, encumber or give lenders a security interest in, such commodities, or on inventories of food or other products derived from such commodities, and any receivables or proceeds from the sale of such commodities or products, and that such arrangements are contrary to the public interest. This subsection is intended to remedy such burden on commerce in perishable agricultural commodities and to protect the public interest.

(2) Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such

commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents. Payment shall not be considered to have been made if the supplier, seller, or agent receives a payment instrument which is dishonored. The provisions of this subsection shall not apply to transactions between a cooperative association, as defined in section 1141j(a) of Title 12, and its members.

(3) The unpaid supplier, seller, or agent shall lose the benefits of such trust unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or broker within thirty calendar days (i) after expiration of the time prescribed by which payment must be made, as set forth in regulations issued by the Secretary, (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction, or (iii) after the time the supplier, seller, or agent has received notice that the payment instrument promptly presented for payment has been dishonored. The written notice to the commission merchant, dealer, or broker shall set forth information in sufficient detail to identify the transaction subject to the trust. When the parties expressly agree to a payment time period different from that established by the Secretary, a copy of any such agreement shall be filed in the records of each party to the transaction and the terms of payment shall be disclosed on invoices, accountings, and other documents relating to the transaction.

(4) In addition to the method of preserving the benefits of the trust specified in paragraph (3), a licensee may use ordinary and usual billing or invoice statements to provide notice of the licensee's intent to preserve the trust. The bill or invoice statement must include the information required by the last sentence of paragraph (3) and contain on the face of the

statement the following: "The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received."

(5) The several district courts of the United States are vested with jurisdiction specifically to entertain (i) actions by trust beneficiaries to enforce payment from the trust, and (ii) actions by the Secretary to prevent and restrain dissipation of the trust.

(June 10, 1930, c. 436, § 5, 46 Stat. 534; Aug. 20, 1937, c. 719, § 7, 50 Stat. 728; May 7, 1984, Pub.L. 98-273, § 1, 98 Stat. 165; Dec. 13, 1991, Pub.L. 102-237, Title X, § 1011(3), 105 Stat. 1898; Nov. 15, 1995, Pub.L. 104-48, §§ 6, 8(b), 109 Stat. 427, 429.)

§ 499f. Complaints, written notifications, and investigations

(a) Reparation complaints

(1) Petition; process

Any person complaining of any violation of any provision of section 499b of this title by any commission merchant, dealer, or broker may, at any time within nine months after the cause of action accrues, apply to the Secretary by petition, which shall briefly state the facts, whereupon, if, in the opinion of the Secretary, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Secretary to the commission merchant, dealer, or broker, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Secretary.

(2) Filing and handling fees

A person submitting a petition to the Secretary under paragraph (1) shall include a filing fee of $60 per petition. If the Secretary determines under paragraph (1) that the facts contained in the petition warrant further action, the person or persons submitting the petition shall submit to the Secretary a handling fee of $300. The Secretary may not forward a copy of the complaint to the commission merchant, dealer, or broker involved until after the Secretary receives the required handling fee. The Secretary shall deposit fees submitted under this paragraph into the Perishable Agricultural Commodities Act Fund provided for by section 499c(b) of this title. The Secretary may alter the fees specified in this paragraph by rulemaking under section 553 of Title 5.

(b) Disciplinary violations

Any officer or agency of any State or Territory having jurisdiction over commission merchants, dealers, or brokers in such State or Territory and any other interested person (other than an employee of an agency of the Department of Agriculture administering this chapter) may file, in accordance with rules prescribed by the Secretary, a written notification of any alleged violation of this chapter by any commission merchant, dealer, or broker. In addition, any official certificates of the United States Government or States or Territories of the United States and trust notices filed pursuant to section 499e of this title shall constitute written notification for the purposes of conducting an investigation under subsection (c) of this section. The identity of any person filing a written notification under this subsection shall be considered to be confidential information. The identity of such person, and any portion of the notification to the extent that it would indicate the identity of such person, are specifically exempt from disclosure under section 552 of Title 5 (commonly known as the Freedom of Information Act), as provided in subsection (b)(3) of such section.

(c) Investigation of complaints and notifications

(1) Commencing or expanding an investigation

If there appears to be, in the opinion of the Secretary, reasonable grounds for investigating a complaint made under subsection (a) of this section or a written notification made under subsection (b) of this section, the Secretary shall investigate such complaint or notification. In the course of the investigation, if the Secretary determines that violations of this chapter are indicated other than the alleged violations specified in the complaint or notification that served as the basis for the investigation, the Secretary may expand the investigation to include such additional violations.

(2) Issuance of complaint by Secretary; process

In the opinion of the Secretary, if an investigation under this subsection substantiates the existence of violations of this chapter, the Secretary may cause a complaint to be issued. The Secretary shall have the complaint served by registered mail or certified mail or otherwise on the person concerned and afford such person an opportunity for a hearing thereon before a duly authorized examiner of the Secretary in any place in which the subject of the complaint is engaged in business.

However, in complaints wherein the amount claimed as damages does not exceed $30,000, a hearing need not be held and proof in support of the complaint and in support of respondent's answer may be supplied in the form of depositions or verified statements of fact.

(3) Special notification requirements for certain investigations

Whenever the Secretary initiates an investigation on the basis of a written notification made under subsection (b) of this section or expands such an investigation, the Secretary shall promptly notify the subject of the investigation of the existence of the investigation and the nature of the alleged violations of this chapter to be investigated. Not later than 180 days after providing the initial notification, the Secretary shall provide the subject of the investigation with notice of the status of the investigation, including whether the Secretary intends to issue a complaint under paragraph (2), terminate the investigation, or continue or expand the investigation. The Secretary shall provide additional status reports at the request of the subject of the investigation and shall promptly notify the subject of the investigation whenever the Secretary terminates the investigation.

(d) Decisions on complaints

After opportunity for hearing on complaints where the damages claimed exceed the sum of $30,000 has been provided or waived and on complaints where damages claimed do not exceed the sum of $30,000 not requiring hearing as provided herein, the Secretary shall determine whether or not the commission merchant, dealer, or broker has violated any provision of section 499b of this title.

(e) Bond required for certain complaints

In case a complaint is made by a nonresident of the United States, or by a resident of the United States to whom the claim of a nonresident of the United States has been assigned, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Secretary of Agriculture against the complainant on any counter claim by respondent: *Provided*, That the Secretary shall have authority to waive the furnishing of a bond by a complainant who is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond.

(June 10, 1930, c. 436, § 6, 46 Stat. 534; Apr. 13, 1934, c. 120, §§ 8 to 10, 48 Stat. 586, 587; Aug. 20, 1937, c. 719, §§ 8, 9, 50 Stat. 728; June 11, 1960, Pub.L. 86-507, § 1(4), 74 Stat. 200; Oct. 1, 1962, Pub.L. 87-725, § 8, 76 Stat. 675; Feb. 15, 1972, Pub.L. 92-231, § 1, 86 Stat. 38; Dec. 22, 1981, Pub.L. 97-98, Title XI, § 1115(c), 95 Stat. 1270; Oct. 18, 1982, Pub.L. 97-352, § 2, 96 Stat. 1667; Dec. 13, 1991, Pub.L. 102-237, Title X, § 1011(4), 105 Stat. 1898; Nov. 15, 1995, Pub.L. 104-48, §§ 7, 8(a), 109 Stat. 428, 429.)

§ 499g. Reparation order

(a) Determination by Secretary of Agriculture of amount of damages; order for payment

If after a hearing on a complaint made by any person under section 499f of this title, or without hearing as provided in subsections (c) and (d) of section 499f of this title, or upon failure of the party complained against to answer a complaint duly served within the time prescribed, or to appear at a hearing after being duly notified, the Secretary determines that the commission merchant, dealer, or broker has violated any provision of section 499b of this title, he shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order. The Secretary shall order any commission merchant, dealer, or broker who is the losing party to pay the prevailing party, as reparation or additional reparation, reasonable fees and expenses incurred in connection with any such hearing. If, after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary under such rules and regulations as he shall prescribe, unless the respondent has already made reparation to the person complaining, may issue an order directing the respondent to pay to the complainant the undisputed amount on or before the date fixed in the order, leaving the respondent's liability for the disputed amount for subsequent determination. The remaining disputed amount shall be determined in the same manner and under the same procedure as it would have been determined if no order had been issued by the Secretary with respect to the undisputed sum.

(b) Failure to comply with order of Secretary; suit to enforce liability; order as evidence; costs and fees

If any commission merchant, dealer, or broker does not pay the reparation award within the time specified in the Secretary's order, the complainant, or any person for whose benefit such order was made, may within three years of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the commission merchant, dealer, or broker, or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States. Such suit in the district court shall proceed in all respects like other civil suits for damages, except that the findings and orders of the Secretary shall be prima-facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court, nor for costs at any subsequent state of the proceedings, unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

(c) Appeal from reparation order; proceedings

Either party adversely affected by the entry of a reparation order by the Secretary may, within thirty days from and after the date of such order, appeal therefrom to the district court of the United States for the district in which said hearing was held: *Provided*, That in cases handled without a hearing in accordance with subsections (c) and (d) of section 499f of this title or in which a hearing has been waived by agreement of the parties, appeal shall be to the district court of the United States for the district in which the party complained against is located. Such appeal shall be perfected by the filing with the clerk of said court a notice of appeal, together with a petition in duplicate which shall recite prior proceedings before the Secretary and shall state the grounds upon which the petitioner relies to defeat the right of the adverse party to recover the damages claimed, with proof of service thereof upon the adverse party. Such appeal shall not be effective unless within thirty days from and after the date of the reparation order the appellant also files with the clerk a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. Such bond shall be in the form of cash, negotiable securities having a market value at least equivalent to the amount of bond prescribed, or the undertaking of a surety company on the approved list of sureties issued by the Treasury Department of the United States. The clerk of court shall immediately forward a copy thereof to the Secretary of Agriculture, who shall forthwith prepare, certify, and file in said court a true copy of the Secretary's decision, findings of fact, conclusions, and order in said case, together with copies of the pleadings upon which the case was heard and submitted to the Secretary. Such suit in the district court shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated. Appellee shall not be liable for costs in said court and if appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs. Such petition and pleadings certified by the Secretary upon which decision was made by him shall upon filing in the district court constitute the pleadings upon which said trial de novo shall proceed subject to any amendment allowed in that court.

(d) Suspension of license for failure to obey reparation order or appeal

Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment: *Provided*, That if on appeal the appellee prevails or if the appeal is dismissed the automatic suspension of license shall become effective at the expiration of thirty days from the date of the judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.

(June 10, 1930, c. 436, § 7, 46 Stat. 534; Apr. 13, 1934, c. 120, §§ 11 to 13, 48 Stat. 587, 588; June 19, 1936, c. 602, § 3, 49 Stat. 1534; Aug. 20, 1937, c. 719, § 10, 50 Stat. 728; June 23, 1938, c. 599, 52 Stat. 953; May 14, 1940, c. 196, 54 Stat. 214; Oct. 1, 1962, Pub.L. 87-725, §§ 9, 10, 76 Stat. 675; Feb. 15, 1972, Pub.L. 92-231, § 2, 86 Stat. 38; Dec. 13, 1991, Pub.L. 102-237, Title X, § 1011(5), 105 Stat. 1898.)

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person--

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

(c) Fraud in procurement

If, after a license shall have been issued to an applicant, the Secretary believes that the license was obtained through a false or misleading statement in the application therefor or through a misrepresentation, concealment, or withholding of facts respecting any violation of this chapter by any officer, agent, or employee, he may, after thirty days' notice and an opportunity for a hearing, revoke said license, whereupon no license shall be issued to said applicant or any applicant in which the person responsible for such false or misleading statement or misrepresentation, concealment, or withholding of facts is financially interested, except under the conditions set forth in section 499d(b) of this title.

(d) Injunction

In addition to being subject to the penalties provided by section 499c(a) of this title, any commission merchant, dealer, or broker who engages in or operates such business without a valid and effective license from the Secretary shall be liable to be proceeded against in any court of competent jurisdiction in a suit by the United States for an injunction to restrain such defendant from further continuing so to engage in or operate such business, and, if the court shall find that the defendant is continuing to engage in such business without a valid and effective license, the court shall issue an injunction to restrain such defendant from continuing to engage in or to operate such business without such license.

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

(June 10, 1930, c. 436, § 8, 46 Stat. 535; Apr. 13, 1934, c. 120, § 14, 48 Stat. 588; Aug. 20, 1937, c. 719, § 11, 50 Stat. 730; July 30, 1956, c. 786, § 5, 70 Stat. 727; Oct. 1, 1962, Pub.L. 87-725, § 11, 76 Stat. 675; Dec. 13, 1991, Pub.L. 102-237, Title X, § 1011(6), 105 Stat. 1898; Nov. 15, 1995, Pub.L. 104-48, §§ 11, 12(b), 109 Stat. 430, 431.)

§ 499i. Accounts, records, and memoranda; duty of licensees to keep; contents; suspension of license for violation of duty

Every commission merchant, dealer, and broker shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. If such accounts, records, and memoranda are not so kept, the Secretary may publish the facts and circumstances and/or, by order, suspend the license of the offender for a period not to exceed ninety days.

(June 10, 1930, c. 436, § 9, 46 Stat. 535.)

§ 499j. Orders; effective date; continuance in force; suspension, modification and setting aside; penalty

Any order of the Secretary under this chapter other than an order for the payment of money shall take effect within such reasonable time, not less than ten days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, accordingly as it is prescribed in the order, unless such order is suspended, modified, or set aside by the Secretary or is suspended, modified, or set aside by a court of competent jurisdiction. Any such order of the Secretary, if regularly made, shall be final, unless before the date prescribed for its taking effect application is made to a court of competent jurisdiction by the commission merchant, dealer, or broker against whom such order is directed to have such order set aside or its enforcement, operation, or execution suspended or restrained.

(June 10, 1930, c. 436, § 10, 46 Stat. 535.)

§ 499k. Injunctions; application of injunction laws governing orders of Interstate Commerce Commission

For the purposes of this chapter the provisions of all laws relating to the suspending or restraining of the enforcement, operation, or execution, or the setting-aside, in whole or in part, of the orders of the Interstate Commerce Commission are made applicable to orders of the Secretary under this chapter and to any person subject to the provisions of this chapter.

(June 10, 1930, c. 436, § 11, 46 Stat. 535.)

§ 499l. Violations; report to Attorney General; proceedings; costs

The Secretary may report any violation of this chapter for which a civil penalty is provided to the Attorney General of the United States, who shall cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States without delay. The costs and expenses of such proceedings shall be paid out of the appropriation for the expenses of the courts of the United States.

(June 10, 1930, c. 436, § 12, 46 Stat. 536.)

§ 499m. Complaints; procedure, penalties, etc.

(a) Investigation by Secretary of Agriculture; inspection of accounts, records, and memoranda; penalty for refusing inspection

The Secretary or his duly authorized agents shall have the right to inspect such accounts, records, and memoranda of any commission merchant, dealer, or broker as may be material (1) in the investigation of complaints under this chapter, or (2) to the determination of ownership, control, packer, or State, country, or region of origin in connection with commodity inspections, or (3) to ascertain whether section 499i of this title is being complied with, and if any such commission merchant, dealer, or broker refuses to permit such inspection, the Secretary may publish the facts and circumstances and/or, by order, suspend the license of the offender until permission to make such inspection is given. The Secretary or his duly authorized agents shall have the right to inspect any lot of any perishable agricultural commodity covered by this chapter, and if any commission merchant, dealer, or broker having ownership of or control over such lot fails or refuses to authorize or allow such inspection, the Secretary may, after thirty days' notice and an opportunity for a hearing, publish the facts and circumstances and/or, by order, suspend the license of the offender for a period not to exceed ninety days.

(b) Inspection of records; surety bond; suspension of license

The Secretary or the Secretary's duly authorized agents, in order to insure that the prompt payment provision of section 499b(4) of this title is being complied with, shall from time to time inspect the accounts, records, and memoranda of any commission merchant, dealer, or broker determined in a formal disciplinary proceeding under section 499f(b) of this title to have violated such provision. The Secretary may also require that any such commission merchant, dealer, or broker furnish, maintain, and from time to time adjust a surety bond in form and amount satisfactory to the Secretary as assurance that such commission merchant's, dealer's, or broker's business will be conducted in accordance with this chapter and that such commission merchant, dealer, or broker will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title: *Provided*, That if such surety bond is furnished, maintained, and adjusted as required by the Secretary, the

Secretary shall not thereafter inspect the accounts, records, and memoranda of such commission merchant, dealer, or broker under this subsection more than once a year. If any such commission merchant, dealer, or broker refuses to permit such inspection or fails or refuses to furnish, maintain, or adjust such surety bond, the Secretary may publish the facts and circumstances and, by order, suspend the license of the offender until permission to make such inspection is given or such surety bond is furnished, maintained, or adjusted.

(c) Hearings; subpoenas; oaths; witnesses; evidence

The Secretary, or any officer or employee designated by him for such purpose, may hold hearings, sign and issue subpoenas, administer oaths, examine witnesses, receive evidence, and require by subpoena the attendance and testimony of witnesses and the production of such accounts, records, and memoranda as may be material for the determination of any complaint under this chapter.

(d) Disobedience to subpoenas; remedy; contempt

In case of disobedience to a subpoena, the Secretary or any of his examiners may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of accounts, records, and memoranda. Any district court of the United States within the jurisdiction of which any hearing is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring the person to appear before the Secretary or his examiner or to produce accounts, records, and memoranda if so ordered, or to give evidence touching any matter pertinent to any complaint; and any failure to obey such order of the court shall be punished by the court as a contempt thereof.

(e) Depositions; production of accounts, records and memoranda

The Secretary may order testimony to be taken by deposition in any proceeding or investigation or incident to any complaint pending under this chapter at any stage thereof. Such depositions may be taken before any person designated by the Secretary and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition or under his direction and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce accounts, records, and memoranda in the same manner as witnesses may be compelled to appear and testify and produce accounts, records, and memoranda before the Secretary or any of his examiners.

(f) Fees and mileage of witnesses

Witnesses summoned before the Secretary or any officer or employee designated by him shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like service in the courts of the United States.

(June 10, 1930, c. 436, § 13, 46 Stat. 536; July 30, 1956, c. 786, § 6, 70 Stat. 727; Oct. 15, 1970, Pub.L. 91-452, Title II, § 205, 84 Stat. 928; Nov. 1, 1978, Pub.L. 95-562, § 3, 92 Stat. 2381.)

§ 499n. Inspection of perishable agricultural commodities

(a) Employment of inspectors; fees and expenses; inspection certificate as evidence

The Secretary is authorized, independently and in cooperation with other branches of the Government, State, or municipal agencies and/or any person, whether operating in one or more jurisdictions, to employ and/or license inspectors to inspect and certify, without [illegible] the filing of a complaint under this chapter, to any interested person the class, quality, and/or condition of any lot of any perishable agricultural commodity when offered for interstate or foreign shipment or when received at places where the Secretary shall find it practicable to provide such service, under such rules and regulations as he may prescribe, including the payment of such fees and expenses as will be reasonable and as nearly as may be to cover the cost for the service rendered: *Provided*, That fees for inspections made by a licensed inspector, less the percentage thereof which he is allowed by the terms of his contract of employment with the Secretary as compensation for his services, shall be deposited into the Treasury of the United States as miscellaneous receipts; and fees for inspections made by an inspector acting under a cooperative agreement with a State, municipality, or other person shall be disposed of in accordance with the terms of such agreement: *Provided further*, That expenses for travel and subsistence incurred by inspectors shall be paid by the applicant for inspection to the United States Department of Agriculture to be credited to the appropriation for carrying out the purposes of this chapter: *And provided further*, That official inspection certificates for fresh fruits and vegetables issued by the Secretary of Agriculture pursuant to any law shall be received by all officers and all courts of the United States, in all proceedings under this chapter, and in all transactions upon contract markets under

Commodities Exchange Act (7 U.S.C. 1 *et seq.*) as prima-facie evidence of the truth of the statements therein contained.

(b) Issuance of fraudulent certificates; penalties

Whoever shall falsely make, issue, alter, forge, or counterfeit, or cause or procure to be falsely made, issued, altered, forged, or counterfeited, or willingly aid, cause, procure or assist in, or be a party to the false making, issuing, altering, forging, or counterfeiting of any certificate of inspection issued under authority of this chapter, sections 491, 493 to 497 of this title, or any Act making appropriations for the Department of Agriculture; or shall utter or publish as true or cause to be uttered or published as true any such false, forged, altered, or counterfeited certificate, for a fraudulent purpose, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than $500 or by imprisonment for a period of not more than one year, or both, at the discretion of the court.

(June 10, 1930, c. 436, § 14, 46 Stat. 537; Apr. 13, 1934, c. 120, § 15, 48 Stat. 588; Aug. 20, 1937, c. 719, § 12, 50 Stat. 730; Dec. 13, 1991, Pub.L. 102-237, Title X, § 1011(7), 105 Stat. 1898.)

§ 499o. Rules, regulations, and orders; appointment, removal, and compensation of officers and employees; expenditures; authorization of appropriations; abrogation of inconsistent statutes

The Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter, and may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employees not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, binding, telegrams, telephones, lawbooks, books of reference, publications, furniture, stationery, office equipment, travel, and other supplies and expenses, including reporting services, as shall be necessary to the administration of this chapter in the District of Columbia and elsewhere, from the Perishable Agricultural Commodities Act fund provided for by section 499c(b) of this title and any supplements to such fund, and as may be appropriated for by Congress; and there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for such purposes. This chapter shall not abrogate nor nullify any other statute, whether State or Federal, dealing with the same subjects of this chapter; but it is intended that all such statutes shall remain in full force and effect except insofar only as they are inconsistent herewith or repugnant hereto.

(June 10, 1930, c. 436, § 15, 46 Stat. 537; June 15, 1950, c. 254, § 3, 64 Stat. 218.)

§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

(June 10, 1930, c. 436, § 16, 46 Stat. 538.)

§ 499q. Separability

If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and of the application of such provision to other persons and circumstances shall not be affected thereby.

(June 10, 1930, c. 436, § 17, 46 Stat. 538.)

§ 499r. Repealed. Pub.L. 102-237, Title X, § 1011(8), Dec. 13, 1991, 105 Stat. 1898

§ 499s. Depositing appropriations in fund

Any unexpended balances of appropriations for the current fiscal year, and any subsequent appropriations, made to carry out the Acts referred to in section 499c(b) of this title, may be deposited in the Perishable Agricultural Commodities Act fund.

(June 10, 1930, c. 436, § 19, as added June 15, 1950, c. 254, § 4, 64 Stat. 218.)

APPENDIX G

7 CFR Ch. 1 (1-1-00 Edition)

DEFINITIONS

* * * *

46.1 Words in singular form.

Words in this part in the singular form shall be deemed to import the plural, and vice versa, as the case may demand.

46.2 Definitions.

* * * *

(j) *Retailer* is a dealer engaged in the business of selling any perishable agricultural commodity at retail; *Provided,* That occasional sales at wholesale shall not be deemed to remove a dealer from the category of retailer if less than 5 percent of annual gross sales is derived from wholesale transactions.

(k) *Firm* means any person engaged in business as a commission merchant, dealer, or broker.

(l) *Licensee* means any firm who holds an unrevoked and valid unsus-pended license issued under the Act.

(m) *Dealer* means any person engaged in the business of buying or selling in wholesale or jobbing quantities in commerce and includes:

(1) Jobbers, distributors and other wholesalers;

(2) Retailers, when the invoice cost of all purchases of produce exceeds $230,000 during a calendar year. In

computing dollar volume, all purchases of fresh and frozen fruits and vegetables are to be counted, without regard to quantity involved in a transaction or whether the transaction was intrastate, interstate or foreign commerce;

(3) Growers who market produce grown by others.

(4) The term "dealer" does not include persons buying produce, other than potatoes, for canning and/or processing within the State where grown, whether or not the canned or processed product is to be shipped in interstate or foreign commerce, unless such product is frozen, or packed in ice, or consists of cherries in brine.

APPENDIX H

RULES and REGULATIONS

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 46

[Docket No. FV93-353]

RIN 0581-AB28

Regulations (Other Than Rules of Practice) Under the Perishable Agricultural Commodities Act, 1930 (PACA)

Federal Register Vol. 61, No. 60, March 27, 1996

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture is revising the Regulations (other than Rules of Practice) Under the Perishable Agricultural Commodities Act (PACA) to include oil-blanched frozen fruits and vegetables as a commodity covered under the PACA. This rule will grant dealers in frozen oil-blanched products the same rights afforded dealers whose frozen product is water-blanched.

EFFECTIVE DATE: April 26, 1996.

FOR FURTHER INFORMATION CONTACT: J.R. Frazier, Assistant Chief, PACA Branch, Room 2095-So., Fruit and Vegetable Division, Agricultural Marketing Service, U.S.

Department of Agriculture, Washington, DC 20250, Phone (202) 720-4180.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This final rule is issued under the Perishable Agricultural Commodities Act (7 U.S.C. 499 *et seq.*), as amended, hereinafter referred to as the "PACA." The Department of Agriculture is issuing this final rule in conformance with Executive Order 12866.

Executive Order 12778

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. It is not intended to have retroactive effect. This final rule will not preempt any State or local laws, regulation, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), (5 U.S.C. 601 *et seq.*), the Administrator of the Agricultural Marketing Service (AMS) has certified that this action will not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. This is an action that is brought about at the request of the frozen fruit and vegetable industry and would benefit producers and small businesses that process and supply frozen fruits and vegetables by making available to them new remedies under the PACA.

This rule extends PACA coverage to include frozen fruits and vegetables that are oil-blanched, especially frozen french fried potato products. Under previous regulations, suppliers of these commodities suffered considerable financial losses because oil-blanched products were excluded by regulation from PACA coverage. This rule grants dealers in frozen oil-blanched products the same rights afforded dealers whose frozen product is water-blanched.

It is therefore not unduly or disproportionately burdensome on small businesses and in fact, rectifies the previous situation in which processors and suppliers were closed out of remedies with respect to oil-blanched product.

The PACA establishes a code of fair trading by prohibiting certain unfair practices in the marketing of fresh or frozen fruits and vegetables. The law requires that parties fulfill their contractual obligations including prompt pay, and provides a forum wherein persons who suffer damages can recover their losses.

The PACA also impresses a statutory trust for the benefit of unpaid sellers or suppliers on all perishable agricultural commodities received by a commission merchant, dealer or broker and all inventories of food or other products derived from the sale of such commodities or products. Sellers who preserve their eligibility are entitled to payment ahead of other creditors, from trust assets, of money owed on past due accounts.

Information submitted to this Agency by the Frozen Potato Products Institute indicates that frozen potato products represent the largest single frozen commodity shipped in the United States. This information further indicates that potatoes cannot be economically frozen and shipped long distances unless they first undergo oil blanching. As pointed out by the American Frozen Food Institute, oil blanching, like water and steam blanching inactivates enzymes without cooking the product. Water and steam blanched frozen fruits and vegetables are covered under the current regulations, oil-blanched frozen fruits and vegetables are not. To exclude such a substantial portion of the frozen food industry is inconsistent with the intent of the PACA to protect dealers in fresh or frozen fruits and vegetables.

Retailers who buy in interstate or foreign commerce must obtain a PACA license if they buy more than $230,000 of fruits and vegetables during a calendar year. Including oil-blanched product in the calculation of the $230,000 exemption may result in a marginal increase in retailers becoming subject to PACA, requiring them to purchase a PACA license at an annual cost of $400. However, the license fee for retailers is being phased out under the provisions of the Perishable Agricultural Commodities Act Amendments of 1995. By calendar year 1999, retailers will no longer be obligated to pay license fees though they must still be licensed. A marginal increase in the number of retailers subject to the PACA, is not significant compared to the benefits derived in the industry by including these commodities under the PACA.

The proposed rule was published in the Federal Register (59 FR 35487) on July 12, 1994. On September 12, 1994, Notice was given in the Federal Register (59 FR 46772) reopening the comment period. That notice provided another comment period which ended October 12, 1994. Ten comments were received, six in favor and four opposed to the proposed rule.

Three commentors representing retailers and wholesale grocers opposed the rule claiming that it would expand the PACA program.

It is true that the rule does expand the PACA program to a product line that is not currently covered, but only because the current regulations restrict the application of the meaning of "perishable agricultural commodity" as provided in the Act. Oil-blanched product is well within the definition of a perishable agricultural commodity as defined by the statute and is consistent with the industry view of the scope of the Act and the nature of the product. Including oil-blanched frozen fruits and vegetables does not unduly or disproportionately burden retailers. With this final rule, all sales of potato products, whether to wholesale distributors, or retailers, would be covered by the term "perishable agricultural commodity." Further, retailers would be less likely than other dealers to be affected by the rule because frozen oil-blanched product would be a small portion of their total business. However, continuing to exclude (frozen french fried potatoes) the largest single frozen commodity in the United States poses substantial risk to farmers, shippers, and processors who are extending credit without the trust protection the Act affords to other dealers.

Another commentor representing a major restaurant chain opposed the proposed rule because he thought the change might bring restaurants under the jurisdiction of the PACA, and argued that therefore, the economic impact of the rule has been underestimated. Restaurants traditionally have not been considered subject to the PACA by USDA or Congress unless the buying arm of the restaurant is a separate legal entity, and is buying for and/or reselling the product to another entity.

Since restaurants are not subject to the PACA, this change in the regulation will not impact restaurants.

For the reasons stated, we are not making any changes to this final rule based on the above comments.

The commentors in favor of the proposal claimed that frozen potatoes cannot be shipped practically and commercially without being oil-blanched and that extending PACA to cover these products would protect processors and shippers and enhance the protection to farmers. They also pointed out that incorporating oil-blanched products into the regulations was consistent with the current policy of including water-blanched and steam-blanched product and would streamline the administration of PACA because it would no longer be necessary to distinguish oil-blanched from water or steam-blanched products. They also claimed that the proposed rule would improve marketing efficiency, thereby benefitting consumers and the potato industry.

After thoroughly analyzing the comments received and all other available information, the Department has concluded that issuing this rule is appropriate.

Based on the above, the Administrator of the AMS has determined that the issuance of this final rule will not have a significant economic effect on a substantial number of small entities.

After consideration of all relevant material presented, the comments received, and other available information, it is found that this regulation, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 46

Agricultural commodities, Brokers, Penalties, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR Part 46 of the Code of Federal Regulations is amended as follows:

PART 46--REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

1. The authority citation for part 46 continues to read as follows:

Authority: Sec. 15, 46 Stat. 537; 7 U.S.C. 499o.

APPENDIX I

P.L. 104-48, PERISHABLE AGRICULTURAL COMMODITIES ACT AMENDMENTS OF 1995

DATES OF CONSIDERATION AND PASSAGE

House: July 28, 1995
Senate: November 7, 1995
Cong. Record Vol. 141 (1995)
House Report (Agriculture Committee) No. 104-207,
July 26, 1995
(To accompany H.R. 1103)

HOUSE REPORT NO. 104-207
July 26, 1995

* * * *

SECTION-BY-SECTION ANALYSIS

Section 1-Short title, table of contents

Section 1 states that this Act may be cited by its short title as the "Perishable Agricultural Commodities Act Amendment of 1995", and provides a table of contents.

Section 2-Addition of definitions of retailer and grocery wholesaler

This section adds retailers and grocery wholesalers, who will be phased-out of the license fees requirement under the Perishable Agricultural Commodities Act, to the definition section of current statute. Each of these entities operate as a dealer within the program and are therefore defined as a person that is a dealer engaged in their respective operations.

Section 3-Gradual elimination of annual license fee for retailers and grocery wholesalers that are dealers

Section 3 eliminates annual license fees for retailers and grocery wholesalers over a period of three years. The phase-out begins on the first renewal date upon enactment of the legislation. In year one, 100% of the license fee will be paid. In year two, 75% of the licensee fee will be paid. In year three, 50% of the license fee will be paid. In the fourth year, no license fee is required.

Although retailers and grocery wholesalers will not be required to pay a license fee after three years, they are still required to obtain a PACA license and will remain subject to provisions of the PACA program.

New retailers and grocery wholesalers entering the program within the three-years of enactment of the legislation are required to pay the license fee established under the applicable phase-out year. After the third year, new retailers and grocery wholesalers will be required to pay a one-time administrative fee of $100.

Section 3 phases out license fees for retailers and grocery wholesalers. It defines the term "retailer" as a person who is a dealer engaged in the business of selling any perishable commodity at retail. Approximately 4,000 retailers are currently estimated to be licensed under PACA. Those businesses such as grocery stores and other like businesses that predominantly serve those consumers purchasing food for consumption at home or off the premises of the retail establishment are considered to be included in the definition of retailer. It is not the intent of the Committee that the definition of retailer be construed to include foodservice establishments such as restaurants, or schools, hospitals and other institutional cafeterias. Further, the definition of retailer is not intended to include those businesses primarily engaged in the wholesaling or distributing of perishable agricultural commodities, but that occasionally sell directly to consumers. The term grocery wholesaler is defined to mean a person who is a dealer primarily engaged in the full-line wholesale distribution and resale of grocery and related nonfood items (such as perishable agricultural commodities, dry groceries, general merchandise, meat, poultry, seafood, and health and beauty care items) to retailers. The Committee established specific types of products typically distributed by grocery wholesalers to provide the Secretary the means by which to discriminate between grocery wholesalers and other persons engaged in the business of wholesaling or distributing perishable agricultural commodities in wholesale or jobbing quantities. Wholesaling and jobbing quantities are considered the aggregate quantities of all types of produce totaling one ton or more in weight in any day, shipped, received, or contracted to be shipped or received.

At the end of the three year phase out period, retailers and grocery wholesalers currently paying annual license fees will not be required to pay any fee for renewal of the license. During the phase out period, new retailer and grocery wholesaler applicants will pay the specified fee established under the applicable phase-out year. After the phase out, new retailer and grocery wholesaler applicants will pay a one-time administrative fee of $100 for their license.

The Committee expects that licenses for retailers and grocery wholesalers will be renewed utilizing a simplified process. The Secretary shall mail to each licensed retailer and grocery wholesaler, at least 30 days before the anniversary date, a notice of the necessity of renewing the license and a copy of the ownership information currently on file. If there are no changes to this information, the licensee shall sign the renewal form and return it to the Secretary. If changes have occurred the licensee shall note these changes and return the signed form. The license will then be automatically renewed.

Section 4-Establishment and alteration of license fees for commission merchants, dealers (other than retailers and grocery wholesalers), and brokers

Section 4 addresses how license fees will be handled for other entities remaining under the PACA program. This Section strikes the current license fee cap of $400 and increases fees to $550. After three years, the Secretary will have the authority to adjust license fee caps pursuant to rulemaking authority only when the PACA operating reserve reaches 25 percent or less. Under current law, the license fee cap can only be changed through legislation. In addition, Section 4 repeals the current 25 percent cap on the operating reserve.

Section 4 gives the Secretary the discretion to issue licenses for periods of more than a year. In an effort to achieve cost effectiveness and efficiency within PACA, the Committee strongly urges the Secretary to move to issuance of multi-year licenses. The USDA shall promptly examine the necessity for a yearly renewal requirement for retailers and grocery wholesalers in an effort to move toward multi-year licenses. Section 4 also gives the Secretary the authority to increase license fees under rulemaking authority, except that the Secretary may not increase the license fee for retailers and grocery wholesalers.

Section 5-Increase in penalties for operating without a license and increase in late renewal fee

Section 5 increases penalties for operating without a license, inadvertent operation without a license, and for late renewals. The penalty for operating without a license is increased from $500 to $1000. The $25 daily penalty for operation without a license is increased to $250 a day. The fine for inadvertent operation without a license is increased from $25 to $250. The late renewal fee is increased from $5 to $50.

Section 6-Statutory trust on commodities and sale proceeds

Section 6 implements the paperless trust provisions of the PACA agreement. Currently, those who wish to protect their trust benefits must notify USDA within 30 days after final payment was due. This provision removes the filing requirement with USDA. Instead, transaction terms set forth in sufficient detail must be submitted by the unpaid supplier, seller and agent to the commission merchant, dealer or broker. Section 6 establishes that a licensee may also preserve trust benefits through the use of ordinary and usual billing or invoice practices as long as a statement indicating that the commodities listed on the invoice are subject to trust claims.

Section 6 implements new provisions regarding the PACA trust. The amendments to the PACA trust provisions contained in this legislation are intended to strengthen and improve the operation of the trust and eliminate the expense to USDA in administering these provisions. Despite the changes to the trust embodied in this legislation certain procedures, obligations and activities must be followed: proper notice must be provided by the supplier to the buyer under the trust provisions, persons within the industry must properly account for assets preserved by the trust. In addition, USDA retains authority to prevent and restrain dissipation of trust assets.

To enhance the operation of the trust, an alternative method of preserving trust benefits has been included in the bill. The current requirement to file a trust notice with USDA is eliminated. Instead, the legislation makes clear that a licensee may use standard invoices or other billing statements to provide notice to the buyer of intent to preserve trust benefits in the event that payment is late or the payment instrument is not honored. For the purposes of preserving the trust, the following notice will meet the requirement of this section if conspicuously placed on invoices or other billing statements: "The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received."

Under current law, the trust is in effect at the time of shipment of the perishable commodity. The unpaid supplier, seller, or agent must provide notice of trust coverage to the buyer in order to preserve these trust benefits. Consistent with this principle, this legislation, under paragraph 4 of section 5(c) of PACA, provides that the supplier, seller, or agent may perfect its trust claim by giving notice to the buyer on the invoice or billing statement. This change to the Act provides both a convenience and cost savings to the unpaid supplier, seller or agent. The Committee intends the effect of notice provided through the use of usual billing or invoice statements to be the legal equivalent to the current practice of providing notice subsequent to the payment date by means independent of the billing statement or invoice.

Section 7-Authority of Department of Agriculture regarding possible violations

Section 7 outlines new requirements for USDA when pursuing a PACA investigation. USDA must have a written complaint in hand before pursuing and/or expanding a PACA investigation. The Secretary may expand an investigation if additional violations are discovered while investigating a complaint based on reasonable grounds. The identity of any person filing written notification is considered confidential. USDA is also required to inform the subject of an investigation about the status of USDA's actions no later than 180 days after initial notification. Section 7 also increases the damage threshold required to receive an expedited review (shortened procedure) of the complaint from $15,000 to $30,000.

Section 7 amends PACA to provide special notification requirements for certain investigations. When the Secretary requires production of certain documents or records for the purpose of investigating a written notification, the Secretary shall notify the subject of the investigation of the existence of the written notification and the nature of the alleged violations of PACA.

Section 8-Filing and handling fees for reparation complaints

Section 8 extends current provisions adopted last year that establish filing fees for informal and formal reparation complaints. The $60 fee for an informal reparation complaint and the $300 fee for a formal reparation complaint are retained and become subject to rulemaking authority of the Secretary wishes to adjust the level in the future.

Section 9-Consideration of collateral fees and expenses

Section 9 establishes clarification of the status of collateral fees and expenses. Collateral fees refer to promotional allowances, rebates, service or material fees paid or provided, directly or indirectly, in connection with the distribution or marketing of perishable agricultural commodities. They are fees considered separate from invoice fees. Section 9 clarifies that a collateral fee is lawful in and of itself.

Section 10-Clarification of misbranding prohibition

In the cases of misbranding, when produce grade, quality, quantity, weight or origin is misrepresented, persons other than the first licensee handling the misbranded commodities are not held liable for the violation by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation.

Section 11-Imposition of civil penalty in lieu of license suspension or revocation

Section 11 authorizes USDA to assess civil monetary penalties not to exceed $2000 for violation of Section 2 in lieu of license suspension or revocation for each violation or each day it continues. Currently, if an entity operating within PACA is found to employ a person responsibly connected with a violating entity the only recourse available to USDA is to initiate a revocation hearing for the entity's license. This provision allows USDA to take a less stringent step by assessing a civil penalty on the entity in lieu of license revocation in cases where entities are found employing a person responsibly connected with a violating entity. However, USDA is required to give consideration to the business size, number of employees, seriousness, nature and amount of the violation when assessing the amount of the penalty.

Section 12-Extension of sanctions to persons responsibly connected to a commission merchant, dealer, or broker

Section 12 addresses two separate issues concerning "responsibly connected". Regarding the first issue, this section amends the current definition to permit individuals, who are responsibly connected to a company in violation of PACA, the opportunity to demonstrate that they were not responsible for the specific violation.

The second issue concerns extension of employment sanctions. Under current law, an individual found to be responsibly connected to a company in violation of PACA can be banned from working (employment sanction) within the industry for a year. However, under current law if such individual is found to be working in the industry while under an employment sanction, USDA can bring enforcement action only against the company employing the individual. Section 12 permits USDA to extend the employment sanction to such individual for an additional year under such circumstances.

In addition to forgoing, the Committee also provided for certain instructions and directions that it intended that the Secretary of Agriculture should comply with as part of this bill.

The Committee instructs the Secretary of the Department of Agriculture to conduct a study and report to the Chairman of the House Committee on Agriculture and to the Chairman of the Senate Committee on Agriculture, Nutrition, and Forestry, within one year of the date of enactment, a study regarding the feasibility of regulating the sale and marketing of fresh-cut flowers under PACA. The report shall include other potential solutions to payment problems that may impact fresh-cut flower producers.

The Committee further instructs the Secretary to conduct and report to the Chairmen of the House and Senate Committees within one year a study regarding options for including carriers and transporters of perishable commodities under PACA. The study shall include recommendations regarding the impact of trust provisions on, and protection available to truckers and carriers under, bankruptcy proceedings.

In order to accurately reflect an increased role as a purchaser's agent, the Committee directs USDA to review and revise, to the extent practicable, the category or broker and buying broker.

APPENDIX J

J-1

ANDREWS & KURTH L.L.P.
[Letterhead]

June 16, 1995

VIA FACSIMILE

Mr. Michael Clancy
United States Department of Agriculture
Fruit and Vegetable Division
Perishable Agricultural Commodities Act Branch
Washington, D.C.

Dear Mr. Clancy:

I spoke to you by telephone on June 1 regarding the applicability of the Perishable Agricultural Commodities Act to our client, Magic Restaurants, Inc. Our client and several of its wholly-owned subsidiaries have filed Chapter 11 Bankruptcy petitions and one such subsidiary is currently the defendant in a statutory trust action asserted under 7 U.S.C. 499e(c).

The action was brought by Bowie Produce, Inc. ("Bowie") and seeks an administrative claim in Magic's bankruptcy proceeding as a result of its alleged rights under §499e. It is Magic's position that it is not covered by §499e(c), as it is in the business of owning and operating restaurants only and is not a broker, dealer or commission merchant as we understand those terms. In this regard, I spoke to Bruce Sommers and Alexis Estevez, of your branch. Mr. Sommers and Ms. Estevez were able to answer our questions; however, Mr. Sommers suggested we request a written response from you.

Mr. Sommers had indicated to us that unless our client was a large restaurant chain that processes their own food at separate distribution centers similar to a Burger King, Wendy's or McDonalds our client was most likely *not* under P.A.C.A. purview. You should note that our client receives its produce from Bowie (who we believe to be the commission merchant, broker or dealer).

Our questions are as follows:

1. Is Magic Restaurants, Inc., principal headquarters located in One Executive Boulevard, Yonkers, NY, 10701 or Magic American Cafe, Inc., located at 4095 Powder Mill Road, Beltsville, MD, 20705, licensed under P.A.C.A. as a "dealer," "broker," or "commission merchant?"

2. If not, is the fact that neither of these entities are licensed under P.A.C.A. dispositive of the applicability of the statute to them?

3. Is a restaurant which receives perishable agricultural commodities from local suppliers, and does not act as central distributor for individual subsidiary restaurants, considered as a "dealer," "broker," or "commission merchant" under §499a(6)?

4. Are restaurants always considered "dealers," "brokers," or "commission merchants" under §499a(6) and if so under what circumstances?

5. Is P.A.C.A. applicable in any way to a restaurant which receives perishable agricultural commodities from local suppliers, and does not act as central distributor for individual subsidiary restaurants?

6. Is P.A.C.A. applicable to restaurants in general in any way?

We would very much appreciate any written responses you could provide us by facsimile. Your prompt response would be greatly appreciated.

Thank you for your time and efforts.

Sincerely,

/ s / Meric A. Underweiser
Meric A. Underweiser
Andrews & Kurth L.L.P.

cc: Peter S. Goodman, Esq.
Laura Davis Jones, Esq.
John Lee, Esq.

APPENDIX K

United States
[SEAL] Department of Agriculture
[Letterhead]

July 6, 1995

VIA FACSIMILE AND REGULAR MAIL

Mr. Meric A. Underweiser, Esq.
Andrews & Kurth L.L.P.
Attorneys
425 Lexington Avenue
New York, New York 10017

Dear Mr. Underweiser:

I am responding to your faxed inquiry received on June 27, 1995, seeking information into the license liability of your client, Magic Restaurants, Inc., under the Perishable Agricultural Commodities Act (PACA).

Attempting to answer each question set forth in your request, I will respond to them as presented:

1. Magic Restaurants, Inc., Yonkers, New York or Magic American Cafe, Inc., Beltsville, Maryland have never been licensed under the PACA.

2. No. Although each separate legal entity operating subject to the Act is required to maintain a valid and

current license, there is some latitude in the Act whereby entities that inadvertently operate without a license, can settle their liability without a penalty. Therefore, whether or not a license has been issued to a firm is not a basis for determining whether it is under the jurisdiction of the PACA.

3. No. However, if a restaurant acting a central distributor or buyer did purchase or sell ton lot quantities of fresh and frozen fruits and vegetables in the course of interstate or foreign commerce to its subsidiaries or sister companies, it would be considered a dealer, operating subject to the PACA and would be required to obtain a PACA license.

4. Restaurants are not considered "dealers," "brokers," "commission merchants" or any other entity whose operations are subject to the PACA.

5. No. The PACA is not applicable to a restaurant that does not act as a central distributor for subsidiary restaurants irrespective of where it obtains its perishable agricultural commodities.

6. No. We are unaware of any legislative history that would reflect Congressional intent to include restaurants as entities under the Act. The Department does not consider restaurants subject to the PACA other than in situations where they act in a capacity other than as a restaurant.

I have returned a copy of your correspondence for your reference.

Sincerely,

/ s / M. A. Clancy
M. A. Clancy, Head
License and Program Review
PACA Branch
Fruit and Vegetable Division
(202) 720-2189